Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

William P. Todd and Diana J. Todd,
on their own behalf and as next friends
for their son, William Matthew Todd, *et al.*,

Petitioners

v.

Rush County Schools, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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6 PP

QUESTION PRESENTED FOR REVIEW

I. Does the Rush County Schools' Extracurricular Activities Drug Testing Program, under which all Rush County High School students who wish to participate in any extracurricular activity must agree to be subject to random and suspicionless urine testing for alcohol, unlawful drug, and cigarette usage, violate the Fourth Amendment rights of students who wish to participate in extracurricular activities other than athletics or cheerleading?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners, William P. Todd and Diana J. Todd, on their own behalf and as next friends for their son, William Matthew Todd and petitioners Steve Hammons and Gina Hammons on their own behalf and as next friends for their children, Anne Hammons, Steve Hammons, Jr., and Jennifer Hammons and the respondents, Rush County Schools and Ed Lyskowinski, in his official capacity as Superintendent of the Rush County Schools.

The parties on appeal are identical. However, although Gina Hammons was identified below as the parent of the three children, this is incorrect as she is in actuality the step-mother of Anne Hammons; Steve Hammons, Jr., and Jennifer Hammons.

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No. _____

In The
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October Term 1997

William P. Todd and Diana J. Todd,
on their own behalf and as next friends
for their son, William Matthew Todd,
et al.,

Petitioners

v.

Rush County Schools, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 12, 1998, is reported at 133 F.3d 984 (7th Cir. 1998) and is reprinted at pages A-1 through A-6 of the appendix to this petition. The Seventh Circuit's order and opinion denying Petition for Rehearing With Suggestion for Rehearing En Banc, dated March 19, 1998, is

reported at 139 F.3d 571 (7th Cir. 1998), and is reprinted at pages A-7 through A-13 of the Appendix to this Petition. The opinion of the United States District Court of the Southern District of Indiana is reported at 983 F.Supp. 799 (S.D.In. 1997) and is reprinted at pages A-14 through A-30 of the appendix to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 12, 1998. The Seventh Circuit's Order denying the petition for rehearing is dated March 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Basis of Federal Jurisdiction in the District Court

The jurisdiction of the District Court was invoked under 28 U.S.C. §1331 because of the presentation of a federal question and 28 U.S.C. §1343 to redress the deprivation of

rights secured by the Constitution of the United States

B. Statement of the Facts

Rush County High School is the only high school in Rush County, a rural Indiana county. (A-15). The High School has 950 students. (*Id.*).

The High School offers numerous extracurricular activities for its students. In addition to athletics there is: Student Council, Student's Against Drunk Driving, French Club, Japanese Club, Spanish Club, Fellowship of Christian Athletes, Future Homemakers of America, Academic Team, Future Farmers of America Officers, Inkspots, Speech Club, Library Club, Broadcasting, Class Officers, and Athletic Council. (Exhibit 5 to Deposition of Bet Kotowski of November 20, 1996). The school recognizes that these activities are valuable since they teach social skills and may, if the student excels, assist the student with getting into college. (A-21).

In August of 1996, the Rush County High School adopted an Extracurricular Activities Drug Testing Program. (A-16; the Program is reproduced in petitioners' Appendix at A-31 through A-42). There is little evidence that any drug problem existed at the High School before the initiation of the Program. The District Court concluded that the objective evidence of problems with drug abuse in the High School was slight.

> The empirical evidence is not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students. Also, the subjective observations are somewhat vague, interspersed with what

> appears to be a motivating view that society in general has a drug problem; this view is not necessarily incorrect, but it does not tend to indicate any specific concern about Rush County in particular. There also is very little to indicate that students in extracurricular activities are "ringleaders" of a drug rebellion . . .

(A-26). Moreover, any drug usage by Rush County High School students has had little impact on school discipline. (A-20). Since the 1992-93 school year there have been no alcohol related expulsions; between one to four drug related expulsions, and between zero to one tobacco related expulsion each year. (*Id.*).

The Program adopted by the High School nevertheless prohibits any Rush County High School student from participating in any extracurricular activity or from driving to school unless and until the student and his parent or guardian consent to the student being tested for drug, alcohol, or tobacco use in random, unannounced urinalysis tests. (A-16).

Once consent is given, the student is subject to testing at any time. (A-17). When testing is done, the testing service brings an RV type vehicle to the School and approximately twenty (20) or thirty (30) students are selected and brought to the vehicle by faculty members. (*Id.*). In the vehicles there are separate areas for male and female students. (*Id.*). The student has two minutes to produce the specimen. (*Id.*). If a student is unable to produce the sample he or she will be given an additional two hours to produce the urine specimen and if unable to do so during this time period the student will be barred from extracurricular activities pending the retest. (*Id.*).

If the result of the test is positive the student and his

family are informed and are given an opportunity to explain the result to the principal of the High School by, for example, submitting proof that the student is taking prescription medication that would produce a positive result. (A-18). Absent a satisfactory explanation, however, the student is barred from all extracurricular activities until passing a retest. (*Id.*). The positive test is reported on a "need to know" basis. (*Id.*). A positive test is to be kept confidential and is not to be used in school discipline proceedings, although it could be subpoenaed in either criminal or juvenile proceedings. (A-18 to A-19).

At the time that the case and summary judgment motions were filed, William Matthew Todd was a freshman at the High School who, before the testing program, functioned as a volunteer who videotaped the football team. (A-21). He did not wear a uniform or engage in any physical activity. (A-21). His parents originally refused to consent to the drug testing and he was barred from videotaping the team. (*Id*).[1] Mr. Todd is a retired 20 year veteran of the Rush County Sheriff's Department where, among other things, he served as an undercover officer during drug investigations. (*Id.*). He does not believe that drug problems at the High School have been

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As petitioners disclosed in their rehearing petition, subsequent to the Court of Appeals decision in this case the Todds signed the consent form to have their son randomly tested pursuant to the challenged policy. However, they continue to object to the testing and would refuse to allow their son to be tested if this would not mean his exclusion from extracurricular activities. The Hammons' have not consented to any testing. *See* Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc, p.7, note 1.

William Matthew Todd will be a Junior at the High School in the 1998-99 school year.

growing worse. (*Id.*).

At the time that the case and summary judgment motions were filed Steve Hammons was the father of three children who attended the High School. (*Id*).[2] The Hammons refused to give permission for the children to be tested under the Program and as a result the three children in High School were barred from all extracurricular activities. (*Id.*). Two of the children had been participating in the Library Club and Future Farmers of America. (*Id.*).

C. Proceedings Below

The case was submitted to the District Court on cross motions for summary judgment. In granting summary judgment for the school system, the District Court concluded that there was no real difference between the non-athlete extracurricular participants in this case and the student athletes that this Court held could be tested in *Vernonia v. School District 47J v. Acton*, 515 U.S. 646 (1995). (A-27 - A-28). The District Court further concluded that all public school students have a diminished expectation of privacy and that special needs exist that justify the testing of extracurricular participants. (A-28). The special needs identified by the District Court are simply that this case involves public school students and that drugs are harmful. (A-26 to A-27). As the District Court acknowledged, "[t]he empirical evidence is not particularly indicative of drug,

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Although in her Affidavit, Gina Hammons described herself as the parent of Anne, Steven and Jennifer Hammons, she is actually their step-mother. Both Anne Hammons and Steve Hammons, Jr., have graduated from the High School. Jennifer Hammons will be a Senior at the High School during the 1998-99 school year. Additionally, Ms. Hammons' child, Jared, will be a Sophomore during the 1998-99 school year at the High School.

alcohol or tobacco use by a majority (or even a large minority) of the students." (A-26).

In affirming the District Court the Seventh Circuit found that deterring drug use among school children was an important interest for the school and that it could justify testing students who had volunteered to participate in extracurricular activities. (A-5). The Seventh Circuit found that demands of extracurricular activities required healthy students. (A-5). Finally, the appeals court found that the testing program was sufficiently similar to that approved by this Court in *Vernonia* and the Seventh Circuit in *Schaill v. Tippecanoe County School Corporation*, 864 F.2d 1309 (7th Cir. 1988), to satisfy the requirements of the Fourth Amendment.[3] (A-6).

ARGUMENT

Reasons for Granting the Petition

Plenary review in this case is appropriate because the Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which conflicts with this Court's decision in *Vernonia* and which absolutely ignores the import of this Court's decision in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295 (1997). As a result the Court of Appeals' decision represents a significant and unwarranted erosion of the Fourth Amendment rights of public

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Although the Court of Appeals found that the drug testing was consistent with its decision in *Schaill* the Court of Appeals does not mention that in *Schaill*, in allowing testing of student athletes and cheerleaders, the Court noted that "sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team." 864 F.2d at 1319.

school students.

I. The Decision Below Goes Far Beyond *Vernonia* and Invites the Expanded Drug Testing of Students Throughout the Country

In *Vernonia* this Court held that student athletes in public schools could, consistent with the Fourth Amendment, be subjected to random drug testing through urinalysis. The Court of Appeals in this case went far beyond both the holding and logic of *Vernonia* to conclude that schools can require as a condition of participation in all extracurricular activities that students be subjected to random drug screens.

School districts around the country have apparently shown a desire to expand *Vernonia* beyond its holding.[4] The

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See e.g., Matt Curry, *Perryton schools resuming drug-testing program soon*, AMARILLO GLOBE-NEWS, January 24, 1998, *available in* http://amarillonet.com (referring to pending district court litigation challenging required drug testing for all extracurricular participants in junior high school and high school in the Tulia and Farwell school districts.)

John Gibeaut, *Seeking Substances: Indiana schools push for expansion of drug testing ruling*, ABA JOURNAL, May 1998, at 42 (referring to, in addition to this case: New Jersey School Board Association policy supporting drug testing of all students; New Orleans's district attorney's proposal for mandatory drug tests for students; Miami-Dade County School District's deciding not to implement a compulsory drug testing program for all students);

Dionne Johnson, *Random drug-testing finds 1 student tests positive*, BATON ROUGE ADVOCATE, March 31, 1998, *available in* WESTLAW, 1998 WL 4893682 (Reporting as to results of drug testing of extracurricular participants)

Mike Lafferty, *Licking Valley students facing drug tests*, COLUMBUS (Ohio)

result of the Court of Appeals decision in this case will be to embolden school districts to expand student drug testing further and further away from the limits expressed in *Vernonia.* Although the Court of Appeals decision is the first of its kind in the circuits, it is not premature for this Court to grant review of this case since it concerns an issue that is alive in every Circuit, if not in every American community, and it concerns an issue that requires definitive interpretation and explication at this time.

II. The Court of Appeals' Decision Conflicts With and Misinterprets *Vernonia* and Ignores this Court's Holding in *Chandler* By Holding that Special Needs Justifying Random and Suspicionless Testing Are Present Merely Because the Students are In Public School and By Failing to Recognize that the Privacy Interests of Non-Athlete Extracurricular Participants are Significantly Greater than those of

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DISPATCH, Dec. 11, 1997, *available in* www.dispatch.com (School Board adopts policy which tests all participants in extracurricular activities which have an academic requirement)

Dustin Long, *Growing Debate*, GREENSBORO (North Carolina) NEWS & RECORD, March 13, 1998 (School Board adopts policy requiring random drug testing policy in order to participate in extracurricular activities).

ACLU sues Arkansas schools to stop random drug screening, DALLAS MORNING NEWS, November 21, 1997, *available in* WESTLAW, 1997 WL 16178980 (Lawsuit filed to challenge school district policy requiring random drug testing in order for students in 7-12 grade to participate in extracurricular activities.)

Schools in Paisley Will Begin Testing Students for Drugs, PORTLAND OREGONIAN, July 18, 1997, *available in* WESTLAW, 1997 WL 4191391 (School Board implements a drug-testing policy for seventh to twelfth graders who wish to participate in extracurricular activities).

the Student Athletes in *Vernonia*

In *Vernonia* this Court reiterated its holding from prior cases that random and suspicionless drug testing constituted a search under the Fourth Amendment, but that it could be justified if there were special needs that outweigh the privacy interests of the individuals who are to be tested. 515 U.S. at 652, 653. However, a suspicionless search is an extraordinary exception to the general rule under the Fourth Amendment that a search must generally be based on some degree of suspicion. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). This Court has emphasized that in determining whether a suspicionless search is justified "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at --, 117 S.Ct. at 1301. Only this careful balancing can insure that Fourth Amendment rights are not violated. In *Vernonia* this Court engaged in this analysis and found that there were significant factors, aside from the fact that the student-athletes attended school, which created special needs. The District Court and Court of Appeals ignored these factors. The lower courts also ignored the fact that the privacy interests of the petitioners are significantly greater than those of the student athletes in *Vernonia*

A. The Court of Appeals decision misapplies the special needs analysis

In *Vernonia* this Court noted that deterring drug use by children in the school's custody was an important interest. 515 U.S. at 661. However, the Court found a number of additional facts which gave rise to a conclusion that special needs were present. First, this Court found in *Vernonia* that the school was faced with a drug epidemic and that student athletes were at the fore of the drug problems. 515 U.S. at 662-63. Yet, in this case

there was no drug crisis and the trial court found that there was no indication that extracurricular participants were leading a drug rebellion. (A-26). There is also no evidence here of an overall drug problem at the High School.

The Court in *Vernonia* also noted that there were special interests justifying the testing of student athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." 515 U.S. at 662. These risks were not present with regard to petitioners who were engaged in such activities as library club and videotaping the football team; neither of which activities carry a risk of physical harm.

Instead of focusing on all of these factors emphasized in *Vernonia*, the Court of Appeals found, as did the District Court, that the students' mere presence in school is a sufficient special need to support the testing. Indeed, the Court of Appeals indicates that the testing is justified by the need to protect the health of students. (A-5 to A-6). This is not a need that is special to athletes or extracurricular participants, but is an amorphous principle that could easily be used to justify the testing of all students who show up for school. This contravenes *Vernonia* and ignores the fact that this Court has specifically held in *Chandler* that various factors must go into deciding if special needs are present other than the fact that the persons to be tested are students. *Chandler*, 520 U.S. at --, 117 S.Ct. at 1302.

B. The Court of Appeals misapplied *Vernonia* by failing to recognize the numerous reasons that the extracurricular students' privacy interests here are higher than those of the athletes in *Vernonia*

Despite the fact that *Vernonia* stressed that in

determining whether random testing could occur the privacy interests of the students had to be balanced with the special needs of the school, the Court of Appeals in this case completely ignored, as did the District Court, the privacy interests of the students which are significantly greater than those in *Vernonia.*

Although all students have a diminished expectation of privacy by virtue of their status as students, this Court in *Vernonia* found that student athletes have even less of a privacy interest than other students since they are used to being seen in a state of undress and are used to extensive regulation. 515 U.S. at 656. However, non-athlete extracurricular participants, like library club members, do not strip to participate in the activity, nor are they extensively regulated. They have no diminished expectation of privacy distinct from students who are merely attending classes and who are not participating in any extracurricular activities.

The Court of Appeals does note that, like the student athletes in *Vernonia,* the extracurricular participants at Rush County High School have volunteered to participate in the extracurricular activity. But, volunteering to participate in a school activity does not operate as a Fourth Amendment waiver. In *Chandler,* this Court did not hold that choosing to run for public office waived a citizen's right to object to a State imposed urine test. In *Vernonia,* as in *Skinner v. Railway Executives Association,* 489 U.S. 602 (1989), the significance of the voluntary nature of the activity is that the individuals voluntarily engaged in a highly regulated activity which carried with it a diminished expectation of privacy. Although participation in non-athletic extracurricular activities is voluntary, it does not carry with it a diminished expectation of privacy.

C. The erroneous holding of the Court of Appeals should be reviewed

Vernonia and *Chandler* both call for a reasoned analysis focussing on the particular facts present to support claims of special needs and to analyze the privacy interests of those to be tested. The Court of Appeals ignores this analysis and instead concludes that the students' status as students and the general need to assure healthy students is enough to justify the testing. This is erroneous. As Judge Ripple, in dissenting from the denial of rehearing in this cause, noted:

> Because of the broad-brushed reading of *Vernonia* embraced by the panel, its decision takes us a long way toward condoning drug testing in the general school population. . . By avoiding *Chandler's* emphasis on the need to define with particularity the group for which testing is justified, the panel opinion has left the jurisprudence without any guiding principle to protect against the sort of general search that, from the beginning of the Republic, had been the principal concern of the Fourth Amendment.

(A-11). It is impossible to reconcile the Court of Appeals' expansive holding with this Court's often quoted statement that children do not "shed their constitutional rights . . . at the schoolhouse gate . . ." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Instead, the decision in this case requires that all school children leave their Fourth Amendment rights to be free from random and suspicionless searches at the door when they enter school each day. This holding will lead to school districts all over the country implementing random testing programs which go far

beyond *Vernonia* and which will threaten the Fourth Amendment rights of all students. The Court of Appeals decision is an erroneous and dangerous holding and it should be reviewed so that the exception created by *Vernonia* does not swallow the rule as explicated in *Tinker*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-2548

WILLIAM P. TODD and DIANA J. TODD,
on their own behalf and as next friends
for their son, WILLIAM MATTHEW TODD,
STEVE HAMMONS, et al.,

Plaintiffs-Appellants,

v.

RUSH COUNTY SCHOOLS and ED LYSKOWINSKI,
in his official capacity as Superintendent of the
Rush County Schools,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 96 C 1417—John D. Tinder, *Judge.*

ARGUED NOVEMBER 6, 1997—DECIDED JANUARY 12, 1998

Before CUMMINGS, MANION and EVANS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This suit was filed by four parents and as next friends for their four children, all students at Rushville Consolidated High School in Rushville, Indiana. In August 1996, the Rush County School Board approved a program prohibiting a high school student from participating in any extracurricular activities or driving to and from school unless the student and parent or guardian consented to a test for drugs, alcohol or tobacco in

random, unannounced urinalysis examinations. Extracurricular activities include athletic teams, Student Council, Foreign Language Clubs, Fellowship of Christian Athletes, Future Farmers of America Officers and the Library Club. When consent for testing is given, participation in the extracurricular organizations or driving to and from school are permitted. The testing is conducted by Midwest Toxicology Services, which collects the samples, and the Witham Hospital Laboratory Services, which performs the analyses. The $30 test is paid for by a grant.

If a test result is positive, the student and family are informed and permitted to explain the result by showing, for example, that the student is taking a medication that would influence the result. Without a satisfactory explanation, the student is barred from extracurricular activities or driving to and from school until passing a retest. However, a positive test result is not to be used in school discipline proceedings. If a student tests positive, the student and his or her parents will be given the names of agencies that might assist the student's recovery. Also if a student tests positive, he or she may request a new urine test. Otherwise the student may be retested after an appropriate interval but will continue to be barred from extracurricular activities and driving to and from school until testing negative.

This program concerns random suspicionless testing. The high school does reserve the right to test any student if it has reasonable suspicion of drug use. If a student tests positive twice, the school is deemed to have reasonable suspicion justifying further retests even though the student will no longer be permitted to engage in any extracurricular activities due to the prior positive results. Tests based on reasonable suspicion, unlike the suspicionless tests, do subject the student to school discipline.

This case was initiated by the students' and parents' complaint and activated by their motion for summary judgment which was denied. In turn, the defendants Rush County Schools and its superintendent filed a motion for summary judgment, which was subsequently granted.

When the summary judgment motions were filed in the trial court, random tests had been performed on five or six occasions involving 20 to 30 students each time. Five to eight students tested positive, three or four for marijuana and the rest for nicotine. From 1992 to 1997 there were no alcohol-related expulsions, zero to one tobacco-related expulsion per year, and one to four drug-related expulsions. Expulsions are not involved in the rule being challenged here. As to suspensions, there were two to nine for alcohol, 21 to 44 for tobacco, and one to nine for drugs.

A 1994 survey of Rush County high school students was conducted by the Indiana Prevention Resource Center and disclosed that cigarette use for Rush County 10th graders was higher than the Indiana average and that alcohol use for 11th and 12th graders was also higher than the state average. Marijuana usage was lower for 9th and 12th graders than the state average. Two witnesses stated that drug use has been increasing at the high school, causing the drowning of a senior and an automobile crash where the students were inhaling the contents of aerosol cans.

As the opinion below reveals, there were 950 students in the Rush County High School for the 1996-1997 school year. Seven hundred twenty-eight agreed to sign with the drug testing program. Of those, 170 did not participate in extracurricular activities (including athletics) or drive to and from school. Plaintiff William Todd's parents refused to sign a consent form for the drug testing program, resulting in his being barred from videotaping the football team. Likewise, the parents of the three plaintiff Hammons children refused to sign the consent form and the children are therefore barred from participating in any extracurricular activities. One of the Hammons children had been a member of the Library Club and another a member of the Future Farmers of America.

The issue before this Court is whether Rush County Schools' drug testing program under which all students who wish to participate in extracurricular activities must consent to random and suspicionless urine testing for alcohol,

unlawful drug, and cigarette usage violates the Fourth Amendment rights of those students.[1] For the following reasons, we hold that Rush County Schools' drug testing program is consistent with the Fourth Amendment.

The outcome of this case is governed by *Vernonia School District 473 v. Acton*, ___ U.S. ___, 115 S. Ct. 2386, and *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).[2] Those cases upheld random urinalysis requirements for students who participate in interscholastic athletics. As in those cases, the testing policy was undertaken in furtherance of the school districts' "responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[3] 115 S. Ct. at 2396. Noting that "Fourth Amendment rights * * * are different in public schools than elsewhere," *id.* at 2392, the Supreme Court in *Vernonia* determined that deterring drug use by students was a compelling interest, finding that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* at 2394.

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[1] As previously noted, the drug testing program at Rush County High School also required that students who were driving to and from school be subject to random, suspicionless testing. Because the plaintiffs in this case were all students who wished to participate in extracurricular activities without having to consent to random, suspicionless drug testing, this Court expresses no opinion as to whether the aspect of the drug testing program which requires students who are driving to and from school to consent to drug testing is constitutional.

[2] In *Schaill*, the urine testing program involved both athletes and cheerleaders.

[3] The Supreme Court stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* at 2391. "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status." *Id.*

As defendants explained, similar to the program in *Vernonia*, their program was designed to deter drug use and not to catch and punish users. The difference between the cited cases and the present one is that here the testing is also required of those engaging in other extracurricular activities. However, we find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students. While the testing in the present case includes alcohol and nicotine, that is insufficient to condemn it because those substances may also affect students' mental and physical condition.

Additionally, while recognizing that extracurricular activities "are considered valuable to the school experience, and [that] participation may assist a student in getting into college," the district judge noted that extracurricular activities, like athletics, "are a privilege at the High School" (Op. 9). In *Schaill*, this Court found significant "the fact that [the] plaintiffs are required to submit to random drug testing only as a condition of participation in an extracurricular activity," in that case athletics. *Schaill*, 864 F.2d at 1319. Similar to *Schaill* and *Vernonia*, the Rush County Schools' drug testing program applies only to students who have voluntarily chosen to participate in an activity. As the district court also noted, students in other extracurricular activities, like athletes, "can take leadership roles in the school community and serve as an example to others" (Op. 14). As this Court has reasoned, "[p]articipation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community" and thus "[i]t is not unreasonable to couple these benefits with an obligation to undergo drug testing." *Schaill*, 864 F.2d at 1320. Therefore it is appropriate to include students who participate in extracurricular activities in the drug testing.

The linchpin of this drug testing program is to protect the health of the students involved. As we have stated, "[t]he plague of illicit drug use which currently threatens our

nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose—the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment." *Schaill,* 864 F.2d at 1324. We conclude that Rush County Schools' drug testing program is sufficiently similar to the programs in *Vernonia* and *Schaill* to pass muster under the Fourth and Fourteenth Amendments.

Judgment Affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—1-12-98

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-2548

WILLIAM P. TODD and DIANA J. TODD,
on their own behalf and as next friends
for their son, WILLIAM MATTHEW TODD,
STEVE HAMMONS, et al.,

Plaintiffs-Appellants,

v.

RUSH COUNTY SCHOOLS and ED LYSKOWINSKI,
in his official capacity as Superintendent of the
Rush County Schools,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 96 C 1417—John D. Tinder, *Judge*.

On Petition for Rehearing En Banc

SUBMITTED JANUARY 29, 1998—DECIDED MARCH 19, 1998

Before POSNER, *Chief Judge*, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD and EVANS, *Circuit Judges*.

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellants and the answer of defendants-appellees, all of the judges

on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc. Judge Kenneth F. Ripple dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Ilana Diamond Rovner. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Joel M. Flaum.

The petition for rehearing is denied.

RIPPLE, *Circuit Judge*, with whom ROVNER, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc. This case presents an important and recurring issue with respect to the scope of suspicionless drug testing of children enrolled in public schools. Because the panel decision gives a very broad reading to the Supreme Court's holding in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and seemingly fails to take fully into account the Supreme Court's holding in *Chandler v. Miller*, 117 S. Ct. 1295 (1997), further review is warranted if we are to avoid sanctioning, by implication, the use of a urine sample as the price of admission to the public schools in this circuit.

At issue in this case is a suspicionless drug testing program for all students who wish to participate in any extracurricular activity offered by the school. Students who wish to participate in such activities as foreign language clubs, the Future Farmers of America or the Library Club must agree to submit to drug testing as a precondition of their participation. In *Vernonia*, the Supreme Court articulated the basic approach to suspicionless drug testing: The reasonableness of the search is to be determined by balancing the intrusion into a person's Fourth Amendment interests against the promotion of legitimate governmental interests. *See* 515 U.S. at 652-53. *Vernonia* involved a relatively

straightforward situation, a drug testing program for student athletes. In examining the privacy interests at stake, the Court began its analysis by noting that the subjects of the test were school children who were committed to the temporary custody of the state as schoolmaster and therefore expected to be subjected to certain physical examination and inoculation requirements as a condition of their enrollment in the institution. The Court then proceeded to stress that student athletes have a lesser degree of privacy as part of their participation in athletics. Indeed, the Court detailed the locker room arrangements and the need for adherence to other training rules that impinge even more on their expectation of privacy. *Id.* at 657. The Court also noted that the process for obtaining the sample was not very intrusive and that the testing methodology was limited to the identification of controlled substances.

When the Court turned to the nature of the governmental interest, it mentioned the general concern of deterring drug use among youth. It then focused on the particular need to test the athletes. "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Id.* at 662. The Court then noted the "state of rebellion" that existed in that particular student body, especially among those involved in athletics. *Id.* at 663. Moving to the efficacy of the means chosen by school authorities to address the problem, the Court noted the "role model" effect of athletes and indeed recognized the wisdom of testing this select group as opposed to the entire student body. *Id.*

Vernonia is susceptible to several different interpretations: (1) that "special needs" justifying drug testing always exist in the public school context, and thus school authorities may require drug testing for any reason including controlling access to core classes, *see, e.g.*, *id.* at 656; (2) that it is necessary to show a particularized govern-

mental need to impose drug testing on a particular student population, *see, e.g.*, Vernonia's "state of rebellion"; (3) that drug testing is permitted in special scholastic environments in which the need is well identified and the privacy expectations are diminished, *see, e.g., id.* at 657.

Chandler, in striking down a drug testing program for candidates for state office, emphasized that the state had not demonstrated a need for suspicionless searches of the defined group. The targeted group had not been found to have a high degree of drug use, nor did the group, as it was defined by the statute, perform highly sensitive safety-related tasks that required this scrutiny.

This case involves an attempt by a school district to subject to suspicionless testing a much broader group than the student athletes involved in the drug testing program in *Vernonia*. The interests of the Rush County school district are substantially different from the ones at stake in *Vernonia*. There is, of course, the residual interest of the district in protecting students from illicit drugs. But, unlike the situation in *Vernonia*, there is no showing of a particularized need because of a "state of rebellion" in the school, and certainly no showing that the targeted group, all students participating in any extracurricular activity, presents a particularized need. In short, the teaching of *Chandler* that the group be defined in terms that demonstrate the government's special need for such testing is markedly absent unless the Supreme Court intended in *Vernonia* that all school children are subject to testing all of the time.

The panel does not explicitly adopt such a broad-stroke reading of *Vernonia*. Yet, it frankly admits that it condones the suspicionless testing of a great part of the student body. Even more significantly, the panel's formula permits this widespread testing on the ground that "successful extracurricular activities require healthy students." *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998). This rationale admits of no principled limitation. Certainly,

physics class, math class or any other part of the school's academic endeavor also requires "healthy students." The assertion that students in extracurricular activities can take leadership roles in the schools and the community is a generality that does little to define, with the particularity suggested by *Chandler*, a group that needs to be tested. Indeed, in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1322 (7th Cir. 1988), this court rejected explicitly the suggestion that athletics and other school activities were similarly situated with respect to the need for suspicionless drug testing.

Finally, the panel notes that participation in the extracurricular programs is a privilege and participation is voluntary. In *Schaill*, this court noted that the fact that the consent to drug testing was limited only to athletic programs and therefore could be avoided simply by refraining from participating in the program ought to be weighed in assessing the reasonableness of the search. Here, by contrast, the requirement affects a much broader aspect of student life. Exclusion of a high school student from all extracurricular activities deprives that student of a great deal of what the modern American high school has to offer in terms of academic and personal development.

Because of the broad-brushed reading of *Vernonia* embraced by the panel, its decision takes us a long way toward condoning drug testing in the general school population. The principal reason given for permitting this program—that the demands of extracurricular activities require healthy students—is as true for scholastic matters as it is for extracurricular activities. By avoiding *Chandler*'s emphasis on the need to define with particularity the group for which testing is justified, the panel opinion has left the jurisprudence without any guiding principle to protect against the sort of general search that, from the beginning of the Republic, had been the principal concern of the Fourth Amendment.

DIANE P. WOOD, *Circuit Judge*, with whom JOEL M. FLAUM, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc. That a panel of this court may have arrived at the correct outcome in a case should only begin our inquiry into whether that case warrants rehearing en banc. The corollary to the recognized proposition that "mere" error of a panel does not merit reconsideration en banc is that certain cases raise recurring, important issues of law that deserve our attention, regardless of the panel's approach.

In *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), the Court upheld a school's policy of randomly drug testing students who voluntarily participated in interscholastic athletics. The Court focused on a variety of factors—that high school athletes have and expect a lesser degree of privacy than other students, *id.* at 657; that there was a drug crisis in the Vernonia school district, with evidence that students participating in high school athletics were at its core, *id.* at 662-63; that drug use by participants in athletics puts both the user and other athletes at substantial risk of physical harm, *id.* at 662; and that "Fourth Amendment rights . . . are different in public schools than elsewhere." *Id.* at 656, 665. Depending on which of these one stresses, *Vernonia* can be read in varying ways. Was the crucial factor the established drug crisis, and the narrow focus on its leaders? A careful balance between the intrusiveness of this specific search and all factors adding to its acceptability? *Cf. Chandler v. Miller*, 117 S. Ct. 1295, 1301 (1997). Unique aspects of student athletics? A distinction between extracurricular activities and those required of all? *Cf.* the panel's opinion, 133 F.3d 984, 986 (7th Cir. 1998). Or that public schools are different, so different that randomized searches of all students would be acceptable? But see *Vernonia*, 515 U.S. at 666 (Ginsburg, concurring) (interpreting the majority's opinion as reserving this question).

Each of these possible interpretations of *Vernonia* is plausible; none clearly trumps the others. The only thing

that is clear is that we cannot simply say "see *Vernonia*" and leave it at that. The constitutionality of drug testing in the schools is a problem that will recur, and the legal interpretation of *Vernonia* we adopt will often be outcome determinative. Because I believe that the clarification and refinement of the *Vernonia* legal standard is a task well worth the full court's attention, I respectfully dissent from the denial of rehearing en banc.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—3-19-98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WIILIAM P. TODD and DIANA J. TODD, on their own behalf and as next friends for their son, WILLIAM MATTHEW TODD; STEVE HAMMONS and GINA HAMMONS, on their own behalf and as next friends for their children ANNE HAMMONS, STEVE HAMMONS, JR. and JENNIFER HAMMONS,	)	
Plaintiffs,	)	
vs.	)	IP 96 1417-C-T/G
RUSH COUNTY SCHOOLS; ED LYSKOWINSKI, in his official capacity as Superintendent of the Rush County Schools,	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the court on Plaintiff's motion for summary judgment under FED. R. CIV. P. 56, and Defendant's motion for summary judgment under the same rule. The court, having considered the motions and supporting briefs,

now finds that the Plaintiff's motion should be **DENIED**, and the Defendants' motion **GRANTED**.

I. Background Facts and Procedural History

Plaintiffs filed suit on October 3, 1996, claiming a violation both of the Fourth Amendment and the analogous provision of the Indiana Constitution. The case moved quickly through discovery, and the relevant facts stated below were developed. These facts are uncontested.[1]

Rush County is a rural county in Indiana with Rushville (Pop. 6000) as the largest community. There are four elementary schools, one middle school, and one high school which are the public schools for the county. The six schools combined have 3009 students. The high school, Rushville consolidated High School ("High School"), has 950 students. It covers grades 9 through 12, and is the only high school in the county.

For some time, the High School has had an athletic code in place which suspends school athletes from participation if they use alcohol, tobacco, or illegal drugs, or are arrested. For the 1996-97 school year, 30 athletes were suspended under this code. Most of these were alcohol and tobacco-related. Smoking is apparently not allowed at the High School.

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1 The Plaintiffs filed a motion to strike various matters submitted by the Defendants in connection with their reply brief. For the most part, the Plaintiffs correctly identified defects in this submission, therefore, the motion to strike is **GRANTED**. The objectionable portions of the Bet Kotowski affidavit were not considered in connection with this entry.

In 1980, the Rush County Local Coordinating Council for Safe and Drug-Free Schools and Communities("LCC") was established, partly motivated by state initiatives. The LCC currently has 67 members, including representatives from the county courts, Family an Children's Services, police, and schools. The LCC is funded mainly through fines imposed by the county courts. The LCC is charged with studying the use of drugs in Rush County, and with providing goals and solutions for reducing drug use in the county.

John Wilson ("Wilson") is the Athletic Director of the High School and has been working at the school since 1970. In recent years, he has come to believe that there is a growing problem with drugs at the school. Around 1995, he began to collect information from other school systems in order to develop a proposed drug testing program ("Program") at the high School. This plan was presented to the LCC, which agreed to provide funding for the Program. The Program was reviewed by the Rush County School Board ("Board") in public meetings. There was minimal opposition voiced to the Program at these meetings.

The Board approved the program in August of 1996, and it became effective in October of 1996. The terms of the Program prohibit a High School student from participating in any extracurricular activity or driving to school unless the student and parent or guardian consent to a test for drugs, alcohol, or tobacco in random, unannounced urinalysis exams. "Extracurricular activity" is defined to include not just athletic teams, but all extracurricular clubs such as the Student Council, Fellowship of Christian Athletes, and the Library Club. Students who want to drive to school are also covered by the

Program.[2] Once consent is given, participation in these organizations is allowed, and students may be subject to testing at any time. The testing is conducted by Midwest Toxicology Services ("Midwest"), which collects samples, and the Witham Hospital Laboratory Services ("Witham"), which performs the actual analysis. The initial test is paid for by the LCC grant. Each test costs approximately $30.

The tests are conducted in the following way: an RV-type vehicle is brought to the High School. The vehicle has separate areas for males and females. The selected students (around twenty to thirty for each test) are escorted to their respective areas by faculty members. They go into a private space and produce a urine sample. The private area contains only a stool which contains a liquid treated to prevent tampering. Students have two minutes to produce a sample. If a student is unable to urinate, twenty-four ounces of liquid is provided for the student to drink, and an additional two hours are allowed to produce a sample. If a student is still unable to urinate, the student is barred from extracurricular activities pending a retest.

Once a sample is produced, the student gives it to the employees of Midwest, who seal the sample and have the student initial it. Students are supervised at all times except for the time they are in the private area. Midwest then delivers the

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2 Through popular literature and the news media, the court is aware that there is a growing trend to require breathalyser tests for school functions such as dances. However, in this case, the Program does not appear to require testing for attendance at school functions such as dances. This type of testing is therefore not currently before the court.

samples to Witham, which analyzes the samples. Witham tests for amphetamines, barbiturates, benzodiazephines (such as Valium and Librium), cocaine, opiates, PCP, marijuana, alcohol, and nicotine. Testing is done on an Emit Immunoassay instrument which has an accuracy rate of greater than 95%. If there is an initial positive detection, the sample is immediately retested using gas chromatography, which has a better than 99% accuracy. The tested-for substances all have different detection periods, ranging from alcohol, which leaves the body in a matter of hours, to marijuana, which may take up to thirty days.

Test results are returned to the school in two or three days. If the test result is positive, the student and family are informed and given an opportunity to explain to the principal the result(for example, by producing a student's prescription medication that would cause the positive test). Without an explanation, the student is barred from extracurricular activities until a retest is passed. Positive test results are reported to persons in charge of extracurricular activities only on a need-to-know basis.

After a positive test result, a student can immediately request a new urine test at the student's own expense. The alternative is for the student to be retested after an interval of time, typically when Midwest returns for the next testing session. This retest is at the school's expense. A positive result on the retest results in a continuing prohibition from participation in extracurricular activities until the student tests negative. However, a student is only permitted one retest paid by the school system. All subsequent retests are at the student's expense.

Positive test results are kept confidential, except as noted above. They are not to be used in school disciplinary

proceedings; however, they could be subpoenaed in criminal or juvenile proceedings. The stated goal of the Program is to provide help for those who test positive. If a student has a positive test result, parents or guardians are given names of agencies that may be able to assist the student.

The High School does reserve the right to test any student at any time if it has reasonable suspicion of drug use. The positive tests under the Program are deemed to be reasonable suspicion. Therefore, a student who tests positive twice may be retested at any time; tests based on reasonable suspicion, unlike Program tests, do subject the student to school discipline.

Since the implementation of the Program, five or six random tests have occurred, involving roughly twenty to thirty students each time. In the first three tests, three to five students per test had positive results. Since then, only two to three students have tested positive. Out of all the positive test results, three or four students tested positive for marijuana; the remainder tested positive for tobacco.

The motivation for implementing the Program is stated to be concern about the use of these substances by students, but the particulars of the origin of that concern are somewhat sketchy. Both Wilson and assistant superintendent Bet Kotowski ("Kotowski"), who is in charge of the Program, cited a subjective perception that drug use was growing among the students of Rush County. They also cited a general concern of rising drug use in society. In addition, they cited a few discrete incidents. In the 1970s a senior on the track team drowned on a school trip due to suspected alcohol use. More recently, an automobile crash involving Rush County High School students occurred during a summer vacation when students in the car were "huffing", which is the inhaling of contents from aerosol

cans. The Defendants have also mentioned the arrests in April of this year of six current and former High School students for drug dealing. However, this final incident occurred after the implementation of the Program, and is not considered as relevant.

The empirical data available in the case is somewhat slight. A list of expulsions and suspensions was submitted for the years 1992 to the present. When broken down by category and year, the data shows that for each school year, there have been no alcohol-related expulsions, between zero to one tobacco-related expulsion per year, and between one to four drug-related expulsions per year. There have been two to nine alcohol-related suspensions per year, twenty-one to forty-four tobacco-related suspensions per year, and one to nine drug-related suspensions per year. There is no consistent increase or decrease in numbers over the years, with numbers in all categories fluctuating from year to year.

A 1994 survey of drug and alcohol use in Rush Country(sic) was also submitted. This survey indicates that statistically significant findings for the year were that: (1) Daily and monthly cigarette use for Rush County 10th-grade students was higher than state rates, which were higher than national rates; (2) the monthly and annual use of alcohol was lower than state rates for 9th-grade students, but higher than the state rates for 11th-grade students; (3) annual, lifetime, and daily marijuana use among 9th and 12th grade students was lower than the state rates, and; (4) states rates overall tend to be lower than national rates, with tobacco use being a notable exception.

There are 950 students at the High School for the current school year. Of these, 728 signed with the Program. Of the 728, 170 neither participate in extracurricular activities nor drive to school. Plaintiff William Matthew Todd ("Todd") is

currently a freshman at the High School. Before the effective date of the Program, Todd was a volunteer videotaping the football team (he was not actually a football player). His parents refused to sign the consent form for the Program, and as a result he has been barred from videotaping the football team.[3] Plaintiffs Anne Hammons ("Anne"), Steve Hammons, Jr. ("Steve"), and Jennifer Hammons ("Jennifer") are also students at the High School. Anne is a senior, and was a member of the Library Club. Steve is a junior who was in the Future Farmers of America. Jennifer is a sophomore, and has not yet participated in any extracurricular activities, but may wish to in the future. All three cannot currently participate in any extracurricular activities due to their parents' refusal to sign the consent form for the Program.

Extracurricular programs are a privilege at the High School. However, they are considered valuable to the school experience, and participation may assist a student in getting into college. Approximately 40% of High School graduates go an to attend college.

II. Standard for Summary Judgment

The Seventh Circuit stated the standard for summary judgment in *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971(7th Cir. 1996):

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3 Interestingly, Todd's father is a recently retired 20-year veteran of the Rush County Sheriff's Department, where he served, among other duties, as an undercover officer in drug investigations. He has stated that he does not believe that drug problems at the High School have grown worse in the last five years.

> Under FED. R. CIV. P. 56(c), summary judgment is warranted only if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law."
>
> The initial burden of production rests with the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323,106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting FED. R. CIV. P. 56(c)). Once the moving party satisfies this burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

Id. at 978. If there is no genuine issue of material fact, as in this case, the only question is whether the moving party is entitled to judgment as a matter of law. *Miranda v. Wisconsin Power & Light Co.* 91 F.3d 10111, 1014 (7th Cir. 1996).

III. Discussion

This case presents a classic constitutional battle. At issue is a pure decision of law, namely whether random drug testing of students involved in any extracurricular activity violates the Fourth Amendment right (and analogous Indiana constitutional right) to be free of unreasonable searches and seizures. The federal question will be addressed first, and, as

will be seen, the result on that issue will make it unnecessary for the Indiana constitutional question to be reached.

There are some baselines to set out. First, it is without question that students do not "shed their constitutional rights... at the school-house gate." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). Second, it is also clear that students are entitled to somewhat less stringent protection of their rights in a school setting; for example, schools need only have "reasonable suspicion" in order to perform a traditional search and seizure. *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985). Third, it is clear that the urinalysis drug-testing program qualifies as a "search" regulated by the Fourth Amendment. *Chandler v. Miller*, 117 S.Ct. 1295, 1300 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

Normally, to be a "reasonable" search under the Fourth Amendment, individualized suspicion is required. As the Supreme Court recently stated, however:

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing....But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement."... When such"special needs"-- concerns other than crime detection-- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties

Chandler, 117 S.Ct. at 1301 (citations omitted). This exception was applied to the school context once before by the Supreme

Court, in the case of *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386 (1995). It is this case which is the focus of conflict between the two parties.

In *Vernonia*, the Court evaluated the constitutionality of a random drug-testing requirement for students who wanted to participate in athletic events. Students who did not allow themselves to be tested could not participate in athletic events. *Vernonia*, 117 S.Ct. at 2389. The program had been motivated by the observed "sharp increase" in disciplinary problems due to drug use. *Id.* The student body was in a "state of rebellion," and this was being led primarily by members of the athletic clubs. *Id.* The coinciding of a nearly three-fold increase in disciplinary problems, plus direct observation by the staff, indicated that there was a problem of "epidemic proportions." *Id.* In addition, there had been several recent incidents of accidents and injuries in athletic competition due to drug use. *Id.*

The Court ruled that the drug testing program for student athletes did not violate the Constitution, citing a number of factors. First, the Court noted that the privacy interest of public school children was significantly less than that of the regular population. *Id.* at 2392. The Court pointed out that the schools stand as "in loco parentis," and that public school children are regularly subjected to physical examinations of various kinds. *Id.* at 2391-92. The court went on to point out that privacy concerns were even smaller in the case of student athletes, who give up considerable privacy (e.g., the locker-room shower) in order to participate in their sport. *Id.* at 2392-93. The Court also noted that high school athletics are heavily-regulated activities, which the student athletes volunteer to join. *Id.* at 2393. Finally, the court noted that there was a particular danger involved in drug use by student-athletes, namely the increased possibility of injury during physical activity. *Id.* at

2395.

The Program in this case is essentially identical to the one in *Vernonia* , with one key difference: the program applies to all extracurricular activities, not just athletics. The Defendants have seized on the closeness of the program to *Vernonia* as a justification of its constitutionality, and seek to use the "in loco parentis" rationale to extend coverage to all extracurricular activities.[4]

The Plaintiffs offer two arguments. First; they argue that there is no evidence of a drug crisis in this case similar to the one in *Vernonia*. In support of this, they cite the discussion of *Vernonia* in the recent *Chandler* decision, and the pre-*Vernonia* decision of *Brooks v. East Chambers Consolidated Ind. Sch. Dist.*, 730 F.Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991). Second, they argue that the difference in the programs-- student athletes versus all extracurricular participants--renders the Program unconstitutional, at least as it applies to the non-athletic extracurricular participants. In support of this, the Plaintiffs point to the athletic-specific language in *Vernonia*, and the Seventh Circuit case of *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).

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3 In fact, the Defendants suggest, and submit law review articles arguing, that the rationale behind *Vernonia* would allow for the testing of the entire student population. However, that scenario is not before this court, just as it was not before the *Vernonia* court. The only question is whether such a testing regime can be applied to students wishing to participate in extracurricular activities.

Unfortunately for the Plaintiffs, both arguments come up somewhat short after a careful review of the *Vernonia* decision. Turning to the first argument, it is true that the Defendants have not shown a level of drug involvement equivalent to that of the *Vernonia* school. The empirical evidence is not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students. Also, the subjective observations are somewhat vague, interspersed with what appears to be a motivating view that society in general has a drug problem; this view is not necessarily incorrect, but it does not tend to indicate any specific concern about Rush County in particular. There is also very little to indicate that students in extracurricular activities are "ringleaders" of a drug rebellion, as in *Vernonia*.

If this were a case like *Chandler*, where the state of Georgia was attempting to create out of whole cloth a "special need" for the testing of adult political candidates, such evidence may not be sufficient to show that need. *Chandler*, 117 S.Ct. at 1303. If the leading precedent on this question was the Brooks case, the evidence may also be insufficient, as that case required a showing that extracurricular participants were more likely to use drugs or that students were being injured by drug use. *Brooks*, 730 F.Supp. at 764. However, the controlling precedent is *Vernonia*, and that case indicates that the evidentiary hurdle for a public school is lower than in other contexts. The court states generally that, "We have found such "special needs" to exist in the importance of "[d]eterring drug use by our Nation's schoolchildren," noting that the impact of drugs on children heightened the already high concern over drug use in general. *Id.* at 2395. The Court then went on to state:

> The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities,

> under a public school system, as guardian and tutor of children entrusted to its care....when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 2396-97. The Court noted that, as in this case, there was no significant opposition to the drug testing program by the community during its planning phases. *Id.* at 2397. Accordingly, the evidence presented, while perhaps not rising to raging epidemic levels, can support a finding that there was a "special need" for the Program in Rush County. There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the "important enough" interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

This leaves the Plaintiff's second argument, that the extension of this particular Program to cover all extracurricular activities renders it unconstitutional. It is true that *Vernonia* contains language that points out special aspects of athletics that influence the issue: for example, the lack of privacy, the possibility of injury, and the voluntary submission to a heavily-regulated activity. It is also true that the Seventh Circuit in deciding a 1988 case essentially identical in facts to Vernonia, stated that, "we believe that sports are quite distinguishable from almost any other activity. Random testing of athletes does not *necessarily* imply random testing of band members or the chess team." *Schaill*, 864 F.2d. at 1319 (emphasis added).

In the end, however, any perceived differences between student athletes in *Vernonia* and the non-athlete extracurricular

participants in this case turn out to be more ethereal than real. As the court in *Vernonia* stated *all* public school students have a diminished expectation of privacy; the Court simply pointed out that athletes have even lower expectations. Furthermore, the possibility of injury is not simply isolated to athletic activity. While the possibility of injury is exacerbated in athletic activity, it is not isolated only to those situations; for example, those students who drive to school under the influence of drugs may face an even greater threat of injury than might an athlete on the field. Certainly, Rush County school system has some responsibility for the health and safety of its students during all extracurricular activities (and while traveling to school). While chess or debate matches may seem to pose little risk of physical harm, traveling to and from them can include risks exacerbated by drug or alcohol use. Finally, while perhaps not to the level of being regulated by the Indiana High School Athletic Association, extracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations. Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant. Also, much like athletes, students in other extracurricular activities can take leadership roles in the school community and serve as an example to others. Being elected class president may put a student in a venerated position, much like that of a star athlete. In fact, the same could be said of any student who participates and excels in any extracurricular activity. Thus, the school has an interest in the conduct of those who may serve as an example to others. In the final analysis, the reasoning of *Vernonia* seems to hold true for any student is a member of an extracurricular activity. The Court simply pointed out these reasons were especially applicable to student athletes. Accordingly, the Defendants motion for summary judgment as to the Fourth Amendment claim is **GRANTED**, and the Plaintiff's motion for

summary judgment on this claim is **DENIED**.[5]

This leaves the Indiana Constitution, which the Plaintiffs argue offers greater protection against search and seizure. How much greater is not made clear. In any event this is not an issue that this court has to decide, especially when the issue would be better decided by an Indiana court. At the outset of this case, the court had original jurisdiction pursuant to 42 U.S.C. Sec. 1983, thus giving the court, by authority of 28 U.S.C. Sec 1367(a), supplemental jurisdiction over Plaintiff's state law claim. However, because the court will grant Defendant's motion for summary judgment and dismiss the Sec. 1983 claim, original jurisdiction is now lacking and Plaintiff's supplemental claim against the Defendants may be properly dismissed pursuant to 28 U.S.C. Sec. 1367(c)(3). Accordingly, the court chooses to exercise its discretion under 28 U.S.C. Sec. 1367(c)(3), and hereby **DISMISSES WITHOUT PREJUDICE** Plaintiff's state law claim against Defendants. Plaintiffs should note that they have up to thirty days from the date of this order during which they may re-file in the appropriate state forum. 28 U.S.C. Sec. 1367(d).

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5 The Plaintiffs allude (in their brief at page 20, n.4) to the potential overbreadth of the Program regarding tobacco, in that some of the students may be over the age of 17, thus, their use of tobacco off school grounds may not be illegal. However, that argument was not developed, and, while one of the Plaintiffs(Anne) is 18, the factual submissions did not justify considering that potential in this case. Therefore, this court will not consider that issue in this case as it is not ripe.

IV. Conclusion

For all of the reasons stated above, the court finds as follows: (1) the Plaintiffs' motion for summary judgment is **DENIED;** (2) the Defendants's motion for summary judgment is **GRANTED**; (3) the Plaintiff's Fourth Amendment claim under 42 U.S.C Sec. 1983 will be **DISMISSED WITH PREJUDICE**; and (4) the Plaintiffs' claim under the Indiana Constitution will be **DISMISSED WITHOUT PREJUDICE.** A judgment will be entered consistent with the terms of this entry.

ALL OF WHICH IS ORDERED this 2nd day of June 1997.

John Daniel Tinder, Judge
United States District Court

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8/96

RUSH COUNTY SCHOOLS
EXTRACURRICULAR ACTIVITIES DRUG TESTING PROGRAM

THE MISSION OF RUSH COUNTY SCHOOLS

Rush County Schools believes that the public school is to provide the best possible educational opportunities for all the youth of the community and for all adults who desire and want to pursue additional training or retraining. These opportunities must focus on the individual in terms of his/her interests, needs, abilities, and capacities. It is the goal of Rush County Schools to provide experiences which will equip the student to meet the responsibilities required of every citizen in our American democratic society. It shall also be the goal of the school to help the individual to acquire basic skills and attitudes necessary for him/her to live a full, productive, and satisfying life.

We also believe the school should make a concerted effort to affect ways of helping all individuals in human understanding and relations, tolerance, and respecting the dignity of a person. Ways must be found to help individuals strive for peace among nations, peoples, and cultures.

Since the schools are only one agency in a community contributing to the education of individuals, the school must join hands with the home and all community agencies and organizations to make a wholesome and healthful environment for all people.

INTRODUCTION

The effective date of this program is August 1, 1996. This

program does not affect the current policies, practices, or rights of Rush County Schools with drug and/or alcohol possession or use, where reasonable suspicion is obtained by means other than drug testing through this policy. Rush County Schools reserves the right to test any student who at any time exhibits cause for reasonable suspicion of drug and/or alcohol usage.

REASONABLE CONCERN

Rush County Schools has a strong commitment to the health, safety and welfare of its students. Results of studies throughout the United States, and an increased substance abuse problem in Rush County, Indiana, indicate that education alone, as a preventive measure, is not effective in combating substance abuse. Statistics show that the mission of Rush County Schools has not been realized. Our commitment to maintaining extracurricular activities in Rush County Schools as a safe and secure educational environment requires a clear policy and supportive programs relating to detection, treatment, and prevention of substance abuse by students involved in extracurricular activities.

PURPOSE

The drug testing program is not intended to be disciplinary or punitive in nature. Students involved in extracurricular activities need to be exemplary in the eyes of the community and other students. It is the purpose of this program to prevent students from participating in extracurricular activities while he/she has drug residues in his/her body, and it is the purpose of this program to educate, help, and direct students away from drug and alcohol abuse and toward a healthy and drug free participation. No student shall be expelled or suspended from school as a result of any verified "positive" test conducted by his/her school under this program other than stated therein.

SCOPE

Participation in extracurricular activities is a privilege. This policy applies to all Rush County Schools students in grades 9-12 who wish to participate in extracurricular activities that are listed in the current student handbook and any other school sponsored extracurricular activities not listed. It also includes any student who wishes to drive to school, from school, or during school.

LEGAL OBLIGATION

Indiana Code 20-8.1-7 sets forth health measures to be governed by school officials. Most specifically, IC 20-8.7-2 establishes the responsibility of schools to assist children found to be ill or in need of treatment.

DRUG EDUCATION

The sponsor or coach of each extracurricular activity will require the attendance of all prospective participants at one or more drug education sessions. Each prospective participant shall receive a copy of this policy and the policy will be explained to them at that time. An educational presentation will also be made to educate the students about the harmful effects and consequences of alcohol and other drug abuse. Students will receive information as to where they can seek professional help, if needed, for a use or abuse problem.

CONSENT FORM

It is MANDATORY that each student who participates in extracurricular activities sign and return the "consent form" prior to participation in any extracurricular activity. Failure to comply will result in non-participation.

Each extracurricular participant shall be provided with a "consent form", a copy of which is attached hereto, which shall be dated and signed by the participant and by the parent/guardian. In so doing, the student is agreeing to participate in the random drug testing program at Rushville Consolidated High School.

TESTING PROCEDURES

(1) The selection of participants to be tested will be done randomly by the principal/administrative designee, and selections will be made from time to time throughout the school year. Names will be drawn from one large pool of those agreeing to be tested. Testing may occur on a different day, Monday through Saturday. This variable schedule will keep students conscious of the possibility of being tested at any time during the year. Each student will be assigned a number that will be placed in the drawing.

(2) If the student shows signs of reasonable suspicion, the principal/administrative designee may call the student's parent/guardian and ask that the student be tested. Factors will include, but are not limited to, excessive discipline problems and/or excessive absences from school. Also, a parent/guardian may request testing of his/her student.

(3) No student will be given advance notice or early warning of the testing. In addition, a strict chain of custody will be enforced to eliminate invalid tests or outside influences.

(4) Upon being selected for a urinalysis test under this policy, either by random draw, reasonable suspicion, request of a parent/guardian, or a "follow-up" test, a student will be required to provide a sample of "fresh" urine according to the quality control standards and policy of the laboratory

conducting the urinalysis.

(5) All students will remain under school supervision until they have produced an adequate urine specimen. If unable to produce a specimen, the student will be given up to 24 ounces of fluid. If still unable to produce a specimen within two hours, the student will be taken to the principal's office and told he/she is no longer eligible for any of the extracurricular activities. In addition, the parents/guardian will be telephoned and informed the student is unable to produce a sample for the testing procedure and that he/she may be tested at a later date to be reinstated for eligibility.

(6) All specimens registering below 90.5 degrees or above 99.8 degrees Fahrenheit will be invalid. There is a heat strip on each of the specimen bottles indicating the validity of the urine specimen by temperature. If this occurs, another specimen must be given by the student.

(7) If it is proven that tampering or cheating has occurred during the collection, the student will become ineligible for all the "extracurricular activities" for the remainder of the school year. This will be reported to the parent/guardian.

(8) Immediately after the specimen is taken, the student may return to class with an admit slip or pass with the time he/she left the collection site. The principal/administrative designee must time and sign the pass.

(9) The specimens will then be turned over to the testing laboratory, and each specimen will be tested for alcohol, nicotine, and "street drugs" (which may include all drugs listed as controlled substances under the laws of the state of Indiana). Also "performance enhancing" drugs such as steroids may be tested.

(10) The laboratory selected must follow the standards set by the Department of Health and Human Services. It must be certified under the auspices of the Clinical Laboratory Improvement Act (CLIA) and the Joint Commission of Accreditation of Healthcare Organizations (JCAHO).

CHAIN OF CUSTODY

(1) The certified laboratory will provide training and direction to those who supervise the testing program, set up the collection environment, and guarantee specimens and supervise the chain-of-custody. To maintain anonymity, the student's number, not name, will be used.

(2) The principal/administrative designee will be responsible for escorting students to the collection site. The student should bring all materials with him/her to the collection site and should not be allowed to go to his/her locker. (The administrator should not bring all the students drawn from the pool to the collection site simultaneously. Calling four or five students at a time allows the collections to be carried out quickly and will not cause students to wait a long time, thereby creating a loss of important time from class. Athletes may be called after school, perhaps during practice time.)

(3) Before the student's urine is tested by the laboratory, students will agree to fill out, sign and date any form which may be required by the testing laboratory. If a student chooses, he/she may notify the administrator that he/she is taking a prescription medication.

(4) A sanitized kit containing a specimen bottle will be given to each student. The bottle will remain in the student's possession until a seal is placed upon the bottle. The student

will sign that the specimen has been sealed. The seal may be broken only by the lab testing the specimen.

(5) If the seal is tampered with or broken, after leaving the student's possession and prior to arriving at the lab, the specimen is invalid. The student will be called again as soon as possible. The student will remain eligible for extracurricular activities subsequent to a retest.

(6) The supervisor obtaining the urine specimen will be of the same gender as the student. Students will b instructed to remove all coats and wash their hands in the presence of the supervisor prior to entering the restroom. The door will be closed so that the student is by himself/herself in the restroom to provide a urine specimen. The supervisor will wait outside the restroom. The student will have two minutes to produce a urine specimen. The commode will contain a blue dye so the water cannot be used to dilute the sample. The faucets in the restrooms will be shut off.

(7) After it has been sealed, the specimen will be transported to the testing laboratory by lab personnel. The testing laboratory will report the results back to the principal/administrative designee.

(8) In order to maintain confidentiality, the container which contains the urine specimen to be tested will not have the name of the student on the container. Instead, the student's random identification number will appear on the container. Also the results sheet for the urinalysis will be mailed back to the principal/administrative designee with no name attached; only the student's random identification number will appear on the results sheet.

TEST RESULTS

(1) This program seeks to provide needed help for students who have a verified "positive" test. The students health, welfare, and safety will be the reason for preventing students from participation in extracurricular activities.

(2) The principal/administrative designee will be notified of a student testing "positive" (that is, if the test shows that the drug residues are in the student's system after using at least two different types of analyses). The principal/administrative designee will notify the student and his/her parent/guardian. The student or his/her parent/guardian may submit any documented prescription, explanation, or information which will be considered in determining whether a "positive" test has been satisfactorily explained.

In addition the student or parent/guardian may appeal by requesting that the urine specimen be tested again by the certified laboratory at a cost to the student or his/her parent/guardian.

(3) If the test is verified "positive", the principal/administrative designee will meet with the student and his/her parent/guardian at a school corporation facility. The student and parent/guardian will be given the names of counseling and assistance agencies that the family may want to contact for help. The student will be prevented from participating in extracurricular activities until after a "follow up" test is requested by the principal/administrative designee and the results are reported.

(4) A "follow up" test will be requested by the principal/administrative designee after such an interval of time that the substance previously found would normally have been eliminated from the body. If this "follow up" test is negative, the student will be allowed to resume extracurricular activities.

If a second "positive" result is obtained from the "follow up" test, or any later test of that participant, the same previous procedure shall be followed. In addition, the Rush County Schools reserves the right to continue testing at any time during the remaining school year any participating student who tested "positive" and did not make satisfactory explanation.

(5) Information on a verified "positive" test result will be shared on a "need to know" basis with the student's coach or sponsor. The results of "negative" tests will be kept confidential to protect the identity of all students being tested.

(6) Drug testing result sheets will be returned to the principal/administrative designee identifying students by number and not by name. Names of students will be locked and secured in a location that only the principal/administrative designee have access to.

FINANCIAL RESPONSIBILITY

(1) Under this policy, Rush County Schools will pay for all initial random drug tests, all initial reasonable suspicion drug tests, and all initial "follow up" drug tests. (Once a student has a verified "positive" test result and has subsequently tested negative from a "follow up" test, any future "follow up" drug test that must be conducted will be paid for by the student or his/her parent/guardian.

(2) A request on appeal for another test of a "positive" urine specimen is the financial responsibility of the student or his/her parent/guardian.

(3) Counseling and subsequent treatment by non-school agencies is the financial responsibility of the student or his/her parent/guardian.

CONFIDENTIALITY

Under this drug testing program, any staff, coach, or sponsor of Rush County Schools who may have knowledge of the results of a drug test will not divulge to anyone the results of the test or the disposition of the student involved, other than in the case of a legal subpoena being made upon that person in the course of a legal investigation. Once again, this will underscore the Rush County Schools commitment to confidentiality with regards to the program.

OTHER RULES

Apart from this drug testing program, Rushville Consolidated High School Athletic Association and the coaching staff/sponsor of each sport/activity have their own training rules and requirements. Coaches/sponsors have the necessary authority to enforce those rules. Any student who violates a rule or requirement as a member of a team or activity will be subject to the consequences as defined in those rules and requirements.

RUSH COUNTY SCHOOLS EXTRACURRICULAR CONSENT FORM

I have received and have read and understand a copy of the "Rush County Schools Extracurricular Activities Drug Testing Program." I desire that _____ participate in this program, and in the extracurricular program of Rush County Schools, and hereby, voluntarily agree to be subject to its terms for the entire high school career (grades 9 - 12). I accept the method of obtaining urine specimens, testing, and analyses of such specimen, and all other aspects of the program. I agree to cooperate in furnishing urine specimens that may be required from time to time.

I further agree and consent to the disclosure of the sampling, testing, and results provided for this program. This consent is given pursuant to all State and Federal Privacy Statutes, and is a waiver of rights to nondisclosure of such test records and results only to the extent of the disclosures in the program.

Date: _____, 19__

_____ _____

Student Signature Parent/Guardian Signature

****

I, _____, have decided not to participate in any extracurricular activities sponsored by Rush County Schools for the remainder of this school year. In order for me to participate in the extracurricular activity program at a later date, I understand, that I must submit to a urinalysis.

Student Signature	Date
Parent/Guardian Signature	Date

FILED
AUG 14 1998
OFFICE OF THE CLERK
U.S.

No. 97-2021

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

William P. Todd and Diana J. Todd,
on their own behalf and as next friends
for their son, William Matthew Todd, *et al.*,

Petitioners

v.

Rush County Schools, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF SETTING OUT ADDITIONAL REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing of the Petition for Writ of Certiorari in this case, the Colorado Supreme Court decided the case of *Trinidad School District No. 1 v. Lopez*, --Colo.-, 1998 WL 373305 (Colo. 1998).[1] In this case the Court declared that the drug testing policy of the Trinidad school District was unconstitutional as violative of the Fourth Amendment to the United States Constitution. The policy required that all sixth through twelfth grade students participating in extracurricular activities be subject to the testing.

The suit was brought by a band student who was enrolled in two for-credit band classes which also had as a requirement that the student participate in the marching band. He refused to take the mandatory urine test in order to participate in the marching band.

Contrary to the Seventh Circuit in this case, the Court in *Trinidad* found a number of reasons why this Court's decision in *Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995), did not allow for the random testing. The Court recognized that *Vernonia* requires that it look at the privacy interests at issue, the character of the intrusion, and the nature of the governmental concern and the efficacy of the chosen

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[1] The case is included in this Supplemental Brief in the Appendix. Although the heading of the case indicates it has not been released for official publication, counsel was informed by a Clerk of the Colorado Supreme Court on August 10, 1998 that the decision was released for official publication on July 16, 1998.

means to address it. --Colo. at --, 1998 WL 373055, *10. However, unlike the Court of Appeals in this case, the Colorado Supreme Court recognized that application of the *Vernonia* test required a conclusion that the extracurricular drug testing program was unconstitutional.

In determining whether, given the desire of the school system to combat drug use, the blanket policy was efficacious, the Colorado Supreme Court noted that:

> the trial court failed to give proper weight to three important facts: 1) that the Policy swept within its reach students who were enrolled in for-credit, instrumental music classes and participated in marching band, 2) that the Policy included student groups that were not demonstrated to have contributed to the drug problem in the District, and 3) that there was no demonstrated risk of immediate physical harm to members of the marching band.

--Colo. at --, 1998 WL 373305, p. 13. Moreover, the Court noted, in language apposite to this case, that even strictly "voluntary" extracurricular activities are not such since:

> the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities. . . Additionally, involvement in a school's extracurricular offerings is a vital adjunct to the educational experience . . . See Todd v. Rush County Schs., No. 97-2548, 1998 WL 122190, at *1-3

> (7th Cir.Mar.19, 1998)(Ripple, J., dissenting from denial of rehearing). . . Being subjected to this type of search as part and parcel to that experience should give us pause before we accept wholesale the notion that drug abuse in the general student population requires such testing.

--Colo. at --. 1998 WL 373305, *13.

Earlier in the decision the Court had found, as argued by the petitioners in this case, that *Vernonia* recognized that the privacy interests of student-athletes were quantitatively and qualitatively less than that of other students. The Court found that the communal undress which the Court found in *Vernonia* was the hallmark of student-athletes, was not present with the band members. The Court also found it significant that the band members were also in a for-credit instrumental class. --Colo. at --, 1998 WL 373305, *11.

The Colorado Supreme Court therefore concluded that the extracurricular drug testing program was unconstitutional and not controlled by *Vernonia* for many of the identical reasons that Rush County's policy is unconstitutional.

> The absence in this case of both true voluntariness and the type of communal undressing that occurred among the student athletes in Vernonia is significant. Second, while the District established that it has a drug problem, the means chosen to deal with that problem were too broad. The Policy's actual scope extended vastly beyond the policy upheld in *Vernonia*.

--Colo. at --. 1998 WL 373305, *14.

The Colorado Supreme Court's decision directly conflicts with the decision of the Seventh Circuit Court of Appeals in this case. This conflict is an additional ground for the granting of the writ of certiorari in this case. *See e.g., Lakeside v. Oregon*, 435 U.S. 313, 336 n. 3 (1978).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Slip Copy
98 CJ C.A.R. 3450
(Cite as: 1998 WL 373305 (Colo.))

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

TRINIDAD SCHOOL DISTRICT NO. 1; the School Board of Trinidad School District No. 1;Louise Terry, President of School Board, in her official capacity; Sally Fabec, School Board member, in her official capacity; Felix A. Morreli, School Board member, in his official capacity; Charles Lochard, School Board member, in his official capacity; Rae Bulson, School Board member, in her official capacity; David Van Sant, Superintendent, in his official capacity; and ROY Bezona, Principal, in his official capacity, Petitioners/Cross-Respondents,

v.

Carlos R. LOPEZ, a minor child, by and through his next friends, parents, and guardians, Luis A. Lopez and Marie S. Lopez Respondents/Cross-Petitioners.

NO. 97SC124.

Supreme Court of Colorado.
En Banc.

June 29, 1998.

Certiorari to the Colorado Court of Appeals Pursuant to C.A.R. 50 EN Banc Judgment Reversed And Case Remanded

Caplan and Earnest LLC, Alexander Halpern,W. Stuart Stuller, Boulder, Lee Allen Hawke, Trinidad, for Petitioners/Cross-Respondents.

The Law Offices of Luis A. Lopez, Luis A. Lopez, K. John Tannous, Trinidad, for Respondents/Cross-Petitioners.

MULLARKEY, Justice.

*1 We granted certiorari to review a drug testing policy promulgated by the Trinidad School District No. 1 Board of Education (Board) in July 1996. [FN1] The policy mandated suspicionless urinalysis drug testing of all sixth through twelfth grade students participating in extracurricular activities. At the beginning of the 1996-1997 school year, the Trinidad School District No. 1 (School District) began regular testing of all students who wanted to take part in extracurricular activities. Carlos Lopez, a senior high school student who was enrolled in two for-credit band classes and participated in the school's marching band, refused to consent to the mandatory drug testing. Consequently, the District superintendent suspended Lopez from the band classes and the marching band. [FN2]

Lopez, by and through his parents, filed a complaint for permanent injunctive and declaratory relief on September 6, 1996 in the Las Animas County District Court (trial court). Lopez alleged among other things that the Policy violated his

right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution. [FN3] Additionally, Lopez alleged that the Policy violated article II, section 7, of the Colorado Constitution. [FN4] Lopez requested that the trial court enjoin the implementation of the Policy and that he be reinstated to the band classes and marching band.

After entering a temporary restraining order that required the District to reinstate Lopez to the band classes and the marching band, the trial court conducted a two day trial on Lopez's underlying complaint. In an order dated December 19, 1996, the trial court entered its findings of facts, conclusions of law, and judgment. The trial court held that the Policy was not unconstitutionally vague and that the Policy did not violate either the Fourth Amendment to the United States Constitution or article II, section 7, of the Colorado Constitution.

Lopez appealed from the trial court's order to the court of appeals. Pursuant to C.A.R. 50, both parties then sought expedited certiorari review in this court, which we granted. We now reverse. We hold that, under the facts of this case, the Policy is unconstitutional with respect to the marching band. [FN5]

I.

The Policy, entitled "Drug Testing Student Athletes/ Cheerleaders/Extra Curricular," mandates drug testing for all students in grades six through twelve who want to participate in an extracurricular activity. [FN6] Under the Policy, the school principal is required to ensure that a student successfully completes an annual drug test prior to participating in the student's chosen first extracurricular

activity of the year. In addition to the mandated testing, the Policy allows school officials to test any student participating in an extracurricular activity based on a reasonable suspicion that the student is under the influence of illicit drugs and/or alcohol. The Policy also requires that a student and the student's parent sign a written form acknowledging the student's consent to be tested. Any student who has been or is currently taking a prescription medication must disclose the use of that medication to school officials before taking the test.

*2 The Policy establishes more severe consequences for successive violations. When a student's drug test indicates a positive result, the laboratory conducting the test performs a second test to confirm the results. If the second test is positive, the student's parent or guardian will be notified and the principal will conduct a due process hearing with the student and his or her parent or guardian. The student then must participate in a drug assistance program and undergo weekly drug tests over a six-week period. If the student refuses, the student will be suspended from participating in extracurricular activities for the current and subsequent seasons and must be tested again prior to the next season for which the student is eligible. If the student commits a second offense, the student's parent or guardian is notified, a due process hearing is held, and the student is suspended from participation in extracurricular activities for the current and subsequent seasons. Thus, when a student commits a second offense, the student does not have the option of enrolling in a drug assistance program in order to participate in the extracurricular activity. Finally, if a student commits a third offense, the student's parents are notified, a due process hearing is held, and the student is suspended from extracurricular activities for the current and next two seasons.

The Board adopted the Policy after two years of study led by the District's former superintendent. The superintendent hired The Search Institute of Minneapolis, Minnesota (Institute) to conduct an attitudinal and behavioral survey in grades six through twelve in the District. [FN7] The Institute reported that 44% of all students in grades six through twelve had used an illicit drug during the preceding twelve months, ranging from 23% in the sixth grade to 63% in the eleventh grade. According to the Institute's report, drug use in Trinidad schools exceeded national statistics. For example, 63% of Trinidad seniors reported using marijuana once in their lifetimes, compared to 35% nationally; 13% of seniors reported one-time cocaine use, compared to 6% nationally; and 20% of eighth grade students reported frequent drug use, compared to 5% nationally.

The trial court found that the scope of the drug problem, which it described as "serious, growing, and immediate," was confirmed by drug-related expulsions and testimony of the administrators, teachers, and coaches in the Trinidad schools. The trial court also found that the level of drug use was approximately the same in the student body generally as it was among participants in athletics and other extracurricular activities. [FN8]

At the same time, however, the band director testified that he did not believe that drug use among band members had increased during the three years preceding the adoption of the Policy. He also testified that in his twenty-three years as the band director, no band member had ever been injured due to alcohol or drug use and there had never been an incident in which a band member had not been able to perform due to alcohol or drug use. In his view, band members were well-behaved and treated the other students with respect. The band director's testimony was mirrored by Dr. Fabec, a Board

member, who testified that, in comparison to the student body generally, band members and others participating in extracurricular activities had better discipline records, were "less problematic," and were leaders of the student body in academic performance.

*3 In its findings, the trial court explained the Board's reasons for selecting students involved in extracurricular activities as the target testing group. The trial court stated:

> These groups were selected for testing because they are role models for other students, and particularly for younger students. Participants in extracurricular activities have a high profile in the schools and within the community. They are representatives or ambassadors of the school district. For these purposes, marching band members are the same as student athletes, and cheerleaders. They represent the school at athletic events, fairs, and state competitions. Band members wear uniforms in the school colors with the school's name.

The trial court also found that some student athletes were using drugs and were encouraging others to do so.

The District began implementing the Policy at the beginning of the 1997 school year. The District hired an independent testing firm, New Choices, to administer the drug tests, to arrange for chemical analysis of the samples, and to report the test results to the administration. All students participating in the fall high school activities of volleyball, football, golf, cheerleading, and the marching band were required to submit to pre-participation drug testing. The District also tested students participating in the fall junior high school activities of volleyball, football, and cheerleading. In total, 181 out of approximately 500 high school students were tested and 90 out of 333 junior high school students were tested. Thus, approximately one in every three high school students was

tested and one in every four junior high school students was tested.

The New Choices Director described the collection of band members' urine samples in the following manner. Students were called out of band class by grade level and taken to the high school gymnasium. Each student proceeded to a table staffed by the New Choices Director, presented the consent form, completed paper work related to the testing, and received a container in which the student was to provide a urine sample. A New Choices monitor then escorted the student to a nearby rest room. Once inside the rest room, the student entered a bathroom stall while the New Choices monitor stood outside of the stall. [FN9] After the student urinated in the container, the monitor escorted the student back to the New Choices Director's table where the student sealed and returned the container. The New Choices Director then checked the temperature of the sample and applied a label to the container. To prevent the possibility of sample tampering, the water to the rest room was cut-off and blue dye was placed in the toilet bowls. In addition, students were required to empty their pockets prior to proceeding to the rest room.

While the trial court found that no student complained about the procedure, one student was unable to produce a sample. The band director testified that the student "tried five, six, seven times," "every night after school," but could not urinate into the container because "he was embarrassed to do so."

*4 After New Choices collected the students' urine samples, the agency forwarded them to a laboratory for testing. The laboratory tested samples for illicit drugs, including marijuana, cocaine, opiates, barbiturates, amphetamines, and phencyclidine. [FN10] The laboratory did not test the samples

for alcohol.

Upon receiving the results from the laboratory, New Choices delivered a sealed report to the District's administrative office. The District's superintendent then transmitted the report to the respective school's principal, who kept it in a secure location. The principal subsequently informed the coach or extracurricular activity sponsor about any positive results. No other persons had access to the testing results.

Lopez, who at the time he brought the action was a seventeen-year-old senior at Trinidad High School, was enrolled in two band classes for which he received both credit and grades and participated in the Trinidad High School marching band. [FN11] As the trial court found, Lopez had been a member of the marching band since 1993 and was a gifted musician who played the baritone trombone, the piano, and the guitar. Lopez testified at the trial that he planned to pursue a music major in college and wanted to be a composer or enter into education.

After Lopez received the consent form in the beginning of the 1997 school year, he consulted with his parents and decided not to sign the form. Lopez testified that by not signing the form, he recognized that he "could be losing scholarship money, or experience that [he] need[ed]." [FN12] However, he indicated that he was willing to take that risk "because it's what this country was founded on, our rights" and that in his view, the drug testing program was "constitutionally wrong."

II.

Before discussing the constitutionality of the Policy, it is necessary to be clear about what this case is not about. Although Lopez challenges the Policy as a whole on

vagueness grounds, an argument which we address below, he does not challenge the part of the Policy that allows school officials to administer a drug test to a student based on reasonable suspicion that the student is under the influence of illicit drugs. [FN13] Rather, he challenges the supicionless testing allowed under the Policy. Consequently, it is unnecessary to revisit our decision in People v. P.E.A., 754 P.2d 382 (Colo.1988), where we considered the Fourth Amendment limitations on searches based on school officials' reasonable suspicions that a student violated the law or a school rule. See P.E.A., 754 P.2d at 386-90 (applying New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), and holding that the school officials' search of the defendant's car in that case was constitutional).

This case also does not require a reexamination of our prior opinion in University of Colorado v. Derdeyn, 863 P.2d 929 (Colo.1993). In Derdeyn, we considered a challenge to the University of Colorado's random, suspicionless urinalysis drug-testing of intercollegiate student athletes attending the university. In analyzing whether the university's drug testing policy violated the Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution, we distinguished college students from high school students. See Derdeyn, 863 P.2d at 938-39. We found the case law related to high school student athletes of "only marginal relevance" and instead followed case law involving searches of adults in the work place. Id. at 939. Thus, given that our analysis in Derdeyn centered around the testing of college students, we do not find it necessary to revisit our holding in Derdeyn that the university's drug testing policy was unconstitutional.

III.

*5 Preliminarily, we address two threshold issues. First, the District's suspicionless drug testing must constitute a "search" within the meaning of the Fourth Amendment in order to trigger the protections of that amendment. Second, because Lopez is no longer a student at Trinidad High School, we must consider whether or not we should decline to review this case because it is moot.

A.

In T.L.O., the Supreme Court explained that it is now beyond dispute that the Fourth Amendment, as applied to the states by virtue of the Fourteenth Amendment, prohibits unreasonable searches by state officers. See T.L.O., 469 U.S. at 334. Equally well settled is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials, including boards of education. See id. Thus, the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches undertaken by public school officials. See id. at 336-37.

State-compelled collection and testing of urine constitutes a "search" subject to the demands of the Fourth Amendment. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (explaining that the Fourth Amendment applies to a school district's drug-testing program involving urine collection and analysis). See also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (explaining that "urine tests are searches [and] it follows that the Custom Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (explaining that "[b]ecause it is clear that the collection and testing of urine

intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment").

In this case, the Policy requires mandatory collection and testing of students' urine. The Policy was enacted and implemented by public school officials. Consequently, the urinalysis drug testing undertaken pursuant to the Policy is a search for Fourth Amendment purposes.

B.

The District argues in its opening brief that the case now before us is moot. According to the District, because Lopez recently graduated from high school, he is beyond the reach of the Policy. Since no other student is before this court challenging the constitutionality of the Policy, the District asserts that there is no longer a live controversy in this case. Additionally, the District argues that we should not apply the "capable of repetition but evading review" exception to the mootness doctrine because younger students will have sufficient time to litigate fully a constitutional challenge to the Policy.

***6** Ordinarily, a court invokes its judicial power only when an actual controversy exists between adverse parties. See In re Tomlinson, 851 P.2d 170, 173 (Colo.1993). An issue becomes moot when the relief granted by the court would not have a practical effect upon an existing controversy. See Brown v. Colorado Dep't of Corrections, 915 P.2d 1312, 1313 (Colo.1996). When an issue is moot, a court normally refrains from addressing it. See id.

The mootness doctrine, however, does not always close the

door to judicial review. We have stated that there are two exceptions to the mootness doctrine. See Board of Chiropractic Exam'rs v. Stjernholm, 935 P.2d 959, 971 (Colo.1997). First, we may resolve what is an otherwise moot case when the issue involved is one that is capable of repetition yet evading review. See id.; see also Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Second, we may decide a moot case involving issues of great public importance or recurring constitutional violations. See Board of Chiropractic Exam'rs, 935 P.2d at 971.

In our view, both exceptions apply in this case. First, we reject the District's argument that the "capable of repetition yet evading review" exception does not apply because younger students in the District would have sufficient time to litigate fully the constitutionality of the Policy prior to graduating from the District. Were we to accept that argument, we would preclude students approaching the end of their education in the District from challenging the Policy. Consequently, those students would be forced to rely on the hope that a younger student and his or her parents would initiate a case against the District. We will not require Lopez (and students similarly situated) to depend on other students to assert a violation of the Constitution simply because it is not possible for Lopez to litigate a case through the appellate process prior to graduating from the District.

Second, we consider the potential invasion of students' constitutional rights to be a matter of great public importance. The fact that Lopez no longer falls within the purview of the Policy does not diminish this conclusion. Although Lopez no longer has to submit to the mandated urinalysis, all other students currently wishing to participate in extracurricular activities in the District must do so. Thus, it is appropriate for us to review Lopez's constitutional challenges to the Policy,

notwithstanding the fact that he is no longer a student in the District.

IV.

Lopez first argues that the trial court abused its discretion in finding that the District had a "serious, growing, and immediate drug problem." Lopez specifically challenges the Institute's report and the trial court's reliance on that report when it made its finding regarding the District's drug problem.

*7 We review the trial court's findings concerning the level of drug abuse in the District under a clearly erroneous standard. Colorado Rule of Civil Procedure 52 provides in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon.... Findings of fact shall not be set aside unless clearly erroneous....

C.R.C.P. 52. In Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), the Supreme Court similarly explained that while determinations of reasonable suspicion and probable cause under the Fourth Amendment should be reviewed de novo on appeal, a reviewing court should review findings of historical fact for clear error. Thus, while we review the trial court's conclusions about the constitutionality of the Policy de novo, including its analysis concerning the reasonableness of the Policy, we review the trial court's findings regarding the level of drug abuse in the district under the clearly erroneous standard.

Applying that standard here, we do not agree with Lopez that the trial court erred in finding that the District had a serious drug problem. We agree with the trial court that the Institute's report provided credible evidence of drug use in the District. Accordingly, we do not find that the trial court's reliance on

the Institute's report was clearly erroneous.

Having concluded that the trial court's findings concerning the District's drug use problem in general were not clearly erroneous, our review of the record indicates that the trial court's order contains two specific findings of fact that were clearly erroneous and both findings bear on our analysis. First, the trial court found:

> The level of drug use is approximately the same among the student body generally and participants in athletics and other extracurricular activities in particular. The high level of participation in activities (at least one-third of the total school population) and the high level of drug use logically support such a conclusion.

This finding has no basis in the record and is nothing more than speculation. The portion of the Institute's report concerning drug use was based on overall drug use in the District and did not quantify drug use by particular groupings, such as drug use among those participating in athletics and/or those participating in other extracurricular activities. Additionally, while the District presented anecdotal testimony from teachers and coaches concerning their impressions of drug use in the District, the trial court did not have before it any testimonial evidence, other than testimony from the high school football coach, which allowed the trial court to compare across extracurricular groups the percent of students abusing drugs generally or the percent of students using particular types of drugs. [FN14] Thus, we do not accept the trial court's findings that the level of drug use in the District generally was the same as the level of drug use across extracurricular activities. Without a discrete study focused on a particular subset of the entire student body, no conclusion can be drawn about the rate of drug use in that subset. The rate may be higher, lower, or the same as the rate for the student body as a whole.

*8 Second, in its findings of fact, the trial court stated the following:

> All students in the junior high school and the high school are required to attend physical education classes. In connection with these classes, the students dress, undress, and shower in communal facilities on a daily basis.
>
> The only evidence in the record concerning physical education in the high school came from a physical education teacher and Lopez himself. The physical education teacher testified that students in the high school are required to take only one year of physical education while in high school and are not required to shower. Lopez explained that the high school students enrolled in physical education are not required to undress completely and that they are not required to shower. As for junior high students, the junior high principal stated, "[S]ome students have to take showers and some students have a problem with that so we have them meet with a counselor. Sometimes, we make arrangements for them to come in earlier to dress or later after the kids until they are comfortable in showering with them." (Emphasis added.) Thus, based on a review of the record, we conclude that the trial court's findings on the type of undressing and showering that occurs in the District during physical education are clearly erroneous and we reject them. See C.R.C.P. 52; Arapahoe County Bd. of Equalization v. Podoll, 935 P.2d 14, 18 (Colo.1997) ("Ordinarily, we will defer to the district court's findings of fact unless they are clearly erroneous and not supported by the record.").
>
> Thus, for purposes of this opinion, the evidence shows a serious drug problem in the general student body. However, other than anecdotal information about the football team, there is no relevant information about drug usage among students who participate in extracurricular activities. Also, there is no evidence of diminished expectations of privacy

among the student body at large based on participation in physical education classes.

V.

Lopez argues that the Policy is unconstitutionally vague. [FN15] The essence of his vagueness argument is that the Policy refers to "extra curricular" in the caption of the Policy, while the remainder of the Policy refers only to athletes and cheerleaders. [FN16] He also asserts that the Policy is deficient because it does not address which drugs the test is designed to detect, but rather, leaves that decision up to the District's business manager and a New Choices representative.

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). In our view, "extracurricular" is not a vague term and it is clear that students participating in extracurricular activities are included within the Policy. Moreover, the consent form which students took home and which was referenced in the Policy explicitly states that students participating in extracurricular activities must submit to drug testing and that the substances tested are those considered illegal or controlled by the Food and Drug Administration. The drugs actually screened by the test fell within the parameters indicated by the Policy. Accordingly, we do not agree with Lopez that the Policy was unconstitutionally vague.

VI.

A.

*9 Before directly addressing Lopez's arguments that the Policy gives rise to an unconstitutional search, we first analyze the actual scope of the Policy. Trinidad High School offers two elective band classes, a brass/percussion class and a woodwinds class. Both of these classes are for-credit classes and are graded. A student enrolling in either or both of these classes is required to participate in the marching band and a student's grade depends in part on the student's performance in the marching band. Conversely, in order to participate in the marching band, a student must enroll in one or both of the band classes. [FN17] In other words, two for-credit classes that are part of the regular curriculum of course offerings are inextricably linked to the "extracurricular" activity of marching band. Properly viewed, there are two aspects to this connection. First, in order to take a for-credit class, for which the student will receive both credit and a permanent letter grade, the student must participate in the marching band. The record reflects that the consequence of enrolling in a class and failing to participate in the marching band is severe: the student will receive a failing grade. Second, in order to participate in the marching band, the student must also take the for-credit class. Thus, while a cursory reading of the Policy indicates that it reaches only those students who are participating in voluntary extracurricular activities, the real scope of the Policy is not so limited. Under the Policy, students who are enrolled in a regular class must provide a urine sample for drug testing. With this more accurate understanding of the Policy in mind, we now consider whether or not the Policy can withstand constitutional scrutiny.

B.

In Vernonia, the Supreme Court established the framework for analyzing the constitutionality of a public school district's

drug testing program similar to the one we consider here. See Vernonia, 515 U.S. at 654-64. The drug testing program at issue in Vernonia authorized random urinalysis drug testing of students who participated in that school district's athletics programs (the Vernonia policy). [FN18] See id. at 650.

In considering the constitutionality of the Vernonia policy, the Supreme Court first reviewed the problem of drug abuse in the Vernonia schools and among the student athletes. See id. at 648-50. The Supreme Court explained that "[n]ot only were athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture." Id. at 649. The Vernonia School District's administrators were particularly concerned about the risk of sports-related injuries due to drug use. See id. The Supreme Court also noted the trial court's findings that a large segment of the student body, particularly those involved in athletics, was in a state of rebellion, which coincided with the school staff's observations of drug use and glamorization of drug use. See id.

***10** Next, the Supreme Court reviewed the purpose and scope of the Vernonia policy. See id. at 650-51. The expressed purposes of the Vernonia School Board in adopting the Vernonia policy were to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs. Under the Vernonia policy, students wishing to play sports were tested at the beginning of the season for their sport. In addition, ten percent of the student athletes were randomly selected for weekly testing.

After concluding that the drug testing at issue in Vernonia fell within its "special needs" Fourth Amendment jurisprudence, [FN19] the Supreme Court applied a three factor test. See id. at 653-64. First, the Court considered "the

nature of the privacy interest upon which the search here at issue intrudes." Id. at 654. Second, the Court looked at "the character of the intrusion that is complained of." Id. at 658. Third, the Court assessed "the nature and immediacy of the governmental concern at issue here, and the efficacy of the means for meeting it." Id. at 660. We discuss below each of these factors as they apply in this case.

1. Nature of the Privacy Interest

The Vernonia Court explained that, while "children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' " Vernonia, 515 U.S. at 655-56 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)) (omission in Vernonia), the Fourth Amendment rights are different in public schools from elsewhere. See id. at 656. At the outset, the Supreme Court emphasized that the State's power over school children is custodial and tutelary in nature. See id. Noting that students are routinely required to have physical examinations and vaccinations, the Court next explained that students within the school environment have a lesser expectation of privacy than members of the population generally. See id. at 656-67. The Court then turned specifically to the student athletes' privacy expectations, explaining that athletes have an even lesser expectation of privacy for two reasons. First, the Court highlighted that "[l]egitimate privacy expectations are even less with regard to student athletes." Id. at 657. On this point, the Court observed that "[s]chool sports are not for the bashful" as they "require 'suiting up' before each practice or event, and showering and changing afterwards." Id. Second, the Court explained that "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." Id. Accordingly, "students who voluntarily

participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." Id.

*11 In discussing the students' expectations of privacy, the trial court in this case concluded that the privacy interests at stake for students affected by the Policy were the same as those in Vernonia. The trial court explained:

> The School District exercises substantial authority over student conduct in furtherance of its recognized custodial and tutelary role. Conduct in the school environment is highly regulated. All students are subject to a comprehensive Code of Conduct governing their behavior. Some student athletes are also subject to more stringent regulations as team members. All students also have a reduced expectation of personal privacy, not just student athletes. All students participate in "communal undress" in the required physical education classes.

After analyzing the Policy and the record, however, it becomes abundantly clear that the latter two points concerning student athletes which the Supreme Court emphasized in Vernonia do not apply to members of the marching band. We therefore do not agree with the trial court that this case is indistinguishable from Vernonia in terms of the privacy interests affected by the Policy.

First, one can hardly argue that the marching band is "not for the bashful." Vernonia, 515 U.S. at 657. Although band members wear uniforms, they do not undergo the type of public undressing and communal showers required of student athletes. [FN20] While the trial court stated that all students undergo "communal undress," the record indicates a qualitatively different type of undressing from the communal undressing the Supreme Court described in Vernonia. As we previously explained, Lopez testified that high school students taking physical education are not required to undress

completely. Lopez and the high school physical education teacher both testified that students enrolled in physical education do not have to shower. Additionally, high school students are only required to take one year of physical education class and Lopez testified that he only took physical education for three semesters in high school. Thus, all students in the District are not required to enroll in physical education every school year. And, for those who do enroll, they do not undergo the same type of communal undressing and showering that the Supreme Court described in Vernonia. Additionally, the junior high school makes special arrangements for those students who are not comfortable showering after physical education classes.

Second, the Trinidad testing program is not limited to students voluntarily choosing to participate in an athletic activity. As discussed, students who take a for-credit instrumental music class offered by the school will be subjected to drug-testing. In our view, the type of voluntariness to which the Vernonia Court referred does not apply to students who want to enroll in a for-credit class that is part of the school's curriculum.

The trial court failed to acknowledge these distinctions in concluding that Vernonia dictates upholding the Policy. While we recognize that students in the public school system have lesser expectations of privacy than adults in the general population, we view the absence of voluntariness and the qualitatively different type of undressing in this case as significant. See Vernonia, 515 U.S. at 666 (Ginsburg, J., concurring) (explaining that the Supreme Court reserves the question on whether a school district could impose mandatory testing on all students and noting that "[t]he Court constantly observes that the School District's drugtesting policy applies only to students who voluntarily participate in interscholastic

athletics"); see also 4 Wayne R. LaFave, Search and Seizure § 10.11(b), at 821 (3d ed.1996) (explaining that the Vernonia Court "deemed important" the student athletes' lower legitimate expectations of privacy and the voluntariness of athletic participation). We thus conclude that the students tested here had higher privacy expectations than the students in Vernonia. [FN21]

2. Character of the Intrusion

*12 The trial court, similar to the Vernonia opinion, likened the mandated urinalysis testing in this case to every day use of the rest room. The trial court stated:

> Moreover, the conditions during the taking of the urine sample are indistinguishable from the ordinary use of the school restrooms. The Court concludes that, as in Vernonia, the personal privacy interest allegedly affected in gathering the urine samples from students is "negligble."

(Citation omitted.)

We question the trial court's conclusion that the ordinary use of the school's rest rooms was indistinguishable from the drug testing that took place here. Ordinarily, a student has some choice about when to use the rest room and when to urinate. The fact that one student was not able to urinate after several attempts because he was too embarrassed underscores this point. Ordinarily, a student does not have an official monitor, a person whose sole purpose is to prevent a student from altering the student's urine sample, listening to (and perhaps watching from behind) the student urinating. Ordinarily, a student does not have to urinate into a container and present his or her urine sample to a school district representative for temperature assessment, labeling, and preparation for analysis. Ordinarily, a student urinates simply because the body requires it, not because a school district insists that the student provide

a urine sample on demand in order for the school district to search it for the presence of drugs. Although we have difficulty understanding the equation of the testing here with every day use of the rest room, we will assume that the analysis set forth in Vernonia dictates that we treat the intrusion here as negligible. [FN22]

3. Governmental Concern and Efficacy of Means

In its order, the trial court explained the nature of the school district's interest in combating the drug problem in the District. The trial court explained:

> It is beyond argument that the School District's interest in maintaining a safe school environment, free of criminal activity, and in protecting its students from the substantial dangers of illegal drug use is extremely significant, even compelling. The evidence clearly demonstrates that a serious drug-use problem exists in the Trinidad Schools, that it has resulted in a dramatic increase in major disciplinary problems, and that ordinary methods, such as drug education, have been ineffectual.

(Citation omitted.)

We agree that the nature of the Board's and the District's concern "is important--indeed perhaps compelling." Vernonia, 515 U.S. at 661. Our main disagreement with the trial court's analysis, however, lies not in its emphasis on the District's drug problem, but in how the trial court treated the efficacy of the Board's chosen means for addressing that problem. The trial court stated:

> ***13** The decision to address this problem by the drug testing procedure set forth in Policy 5541.1 was also reasonable. Plaintiff takes issue with the Board's selection of participants in extracurricular activities for drug testing because the evidence does not establish that students in these groups had

a greater incidence of drug use than the student body as a whole. The relevance of this argument is slight.

We disagree with the trial court's conclusion.

In considering the efficacy of the Policy, the trial court failed to give proper weight to three important facts: 1) that the Policy swept within its reach students who were enrolled in for-credit, instrumental music classes and participated in the marching band, 2) that the Policy included student groups that were not demonstrated to have contributed to the drug problem in the District, and 3) that there was no demonstrated risk of immediate physical harm to members of the marching band.

Unlike the Vernonia policy, the Policy included all students participating in all extracurricular activities, as well as students who want to enroll in a for-credit class. There is no evidence in the record to suggest that marching band members are like "school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Vernonia, 515 U.S. at 662. Indeed, the band director testified that during his twenty-three years as the band director, there had never been a drug-related injury to a student participating in the marching band. Nor is there evidence to suggest that the drug problem existing in the District was "largely fueled by the 'role model' effect" of the students who fell within the Policy's purview. [FN23] Id. at 663. To the contrary, the marching band director stated that he had never had a problem with drug use interfering with marching band members' performances and there had been no increase in drug use among marching band members in the three years preceding this case. The band director described the marching band members as "better quality kids in the school," meaning "well-behaved," and that they treated their fellow students with respect. As noted, a school board

member who supported the Policy similarly explained that band members and students participating in extracurricular activities had better discipline records and performed better academically than did students in the general population. In our view, simply being a role model by virtue of participation in an extracurricular activity is insufficient to support a conclusion that the school's mandated drug testing program was reasonable. See Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 1304, 137 L.Ed.2d 513 (1997) ("Indeed, if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and Vernonia ranked as 'special' wasted many words in entirely unecessary, perhaps even misleading, elaborations.").

The large number of students who were tested in this case raises an additional concern under the reasonableness inquiry. We acknowledge that students who participate in extracurricular activities that are strictly independent of a school's offered curriculum (unlike the marching band) do so on a technically volunteer basis. However, the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities. Lopez himself is the quintessential example. Additionally, involvement in a school's extracurricular offerings is a vital adjunct to the educational experience. See Todd v. Rush County Schs., No. 97-2548, 1998 WL 122190, at *1-3 (7th Cir.Mar.19, 1998) (Ripple, J., dissenting from denial of rehearing) ("Exclusion of a high school student from all extracurricular activities deprives that student of a great deal of what the modern American high school has to offer in terms of academic and personal development."). Being subjected to this type of search as part and parcel to that experience should give us pause before we

accept wholesale the notion that drug abuse in the general student population requires such testing.

VII.

*14 Based on our analysis of all of these factors, we conclude that the Policy is not reasonable and thus cannot stand under the United States Constitution. First, the nature of the privacy interest invaded was different from that of the student athletes described by the Vernonia Court. The absence in this case of both true voluntariness and the type of communal undressing that occurred among the student athletes in Vernonia is significant. Second, while the District established that it has a drug abuse problem, the means chosen to deal with that problem were too broad. The Policy's actual scope extended vastly beyond the policy upheld in Vernonia. The Policy swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury. The Policy also effectively included students enrolled in a for-credit class offered by the District. Even accepting the trial court's reasoning that the invasion of the students' privacy interests was negligible, we find these other distinctions between this case and Vernonia to be dispositive. Accordingly, having considered together the three factors announced by the Vernonia Court, we hold that the Policy is unconstitutional. We therefore reverse the trial court's order and remand the case to the trial court for further proceedings consistent with this opinion.

SCOTT J., dissents, and VOLLACK, C.J., joins in the dissent.

KOURLIS, J., does not participate.

SCOTT, Justice, dissenting.

The Trinidad School District No. 1 Board of Education (Board) was confronted with a "serious, growing, and immediate drug problem." A two-year study revealed that "informational programs," the DARE Program, and health class lectures "were not effectively addressing the problem." A survey revealed that 63% of all students in the eleventh grade and 44% of all students in grades six through twelve had used an illicit drug, that cocaine use was twice the national average among seniors, and that "frequent drug use" [FN24] among eighth grade students exceeded other schools by 400%.

In response, the Board adopted a suspicionless drug-testing policy (Policy) including students in the high school marching band (Band). The Board reasoned that it could impose the Policy upon members of the Band, a voluntary activity that included participation in two for-credit, elective music classes only open to Band members. However, the Board reasoned without taking into account the constitutional significance the majority places upon the award of academic credit and, hence, its impact upon a student's reasonable expectation of privacy.

Because, in my view, the school Board acted "in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" and "the search is one that a reasonable guardian and tutor might undertake," while perhaps not the "least intrusive," Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665, 115 S.Ct. 2386, 132 L.Ed.2d 564(1995), I respectfully dissent.

*15 I, too, am at a loss to identify the role academic credit plays in our Fourth Amendment jurisprudence. Based on my reading of Vernonia, I cannot join a holding that recognizes

enhanced expectations of privacy based on the award of academic credit alone. I find this especially true because the elective academic credit is awarded for participation in a voluntary activity and similar academic instruction is available for those who do not participate in the marching band.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures...." U.S. Const. amend IV. In like regard, the Colorado Constitution provides: "The people shall be secure in their persons, houses and effects, from unreasonable searches...." Colo. Const. art. 2, § 7. While I find voluntariness to be important here, I do not agree with the majority's reading that finds license to draw distinctions in privacy interests based upon whether the activity in question is part of the academic curriculum--whether or not the activity is an elective as opposed to a required course.

Based upon the record in this case, then, I would hold that the Policy adopted by the Trinidad School District is consistent with our state and federal constitutions. I am not persuaded by the majority that a constitutionally significant distinction exists between voluntary participation in an activity that is not required, here marching band, but includes attending an elective for-credit music class so as to result in an "absence of voluntariness," maj. op. at 33. Nor do I believe that the "qualitatively different type of [communal] undress" combined with the Band rules and regulations is constitutionally "significant," id., at least not to cause a result contrary to Vernonia. Moreover, upon my reading of the record, I can find no basis for rejecting the factual findings of the trial court and disagree with the majority's substitution of its own findings for those of the trial court. Instead, I would leave credibility determinations to the trial judge. Therefore,

unlike the majority, upon finding support in the record for the trial court's findings, I believe our legal reasoning must be limited on review to those facts considered by the trial judge.

Finally, while I concede the questions before us are not easy to resolve, I can see no distinction of legal significance to be drawn because a student engaged in Band as an extracurricular or co-curricular activity also is awarded academic credit for their participation. The portion of the Policy under review impacts 73 students, or less than 15% of the student body, who voluntarily participate; it does not impose routine drug testing on all students required to attend school. Accordingly, I would affirm the ruling of the Las Animas County District Court upholding the Policy's validity.

I.

A.

***16** While the majority's recitation of the standard of review is correct, that is, that a trial court's findings cannot be reversed unless "clearly erroneous," maj. op. at 19, in my view, testimony in the record is sufficient to support the trial court's findings. The majority combs through the record and testimony of witnesses, extracting selected portions of testimony to support its own conclusions of fact. In that manner, however, the majority, sitting as an appellate court, fails to grant appropriate deference to the credibility determinations and inferences drawn by the trial court to reach its findings. Unless the trial court's findings are clearly erroneous, and they are not, our precedent dictates that a trial court's findings should not be disturbed on appeal. See Arapahoe County Bd. of Equalization v. Podoll, 935 P.2d 14, 18 (Colo.1997) ("Ordinarily, we will defer to the district court's findings of fact unless they are clearly erroneous and not supported by the record."); see also maj. op. at 23

(citation omitted).

For students who choose to participate in the Band, the high school offers two elective music classes for credit which are taught by the band director, Duane Zanotelli. Zanotelli teaches six music classes. Students are required to enroll in at least one of two classes to become members of the Band and only students who participate in the Band may enroll in either of the two classes. Thus, every member of the Band is also a student in at least one of six music classes taught by Zanotelli. While I do not read the majority opinion to state otherwise, the record emphatically indicates that students who do not wish to participate in the Band can take one or more of four other music classes taught by Zanotelli.

Although other music classes were available to him, Carlos Lopez registered for the band classes and refused to consent to pre-participation drug testing as required by the Policy. Consistent with the Board's Policy, the high school suspended Lopez from the marching band. [FN25] However, at no time was Lopez prevented from enrolling in any of the other music classes that were taught by the same school teacher, the band director, and that would facilitate his graduation from high school and complete his high school music training.

The trial court found that at the time the Policy was adopted, the Trinidad schools were confronted with a "serious, growing, and immediate drug problem." Based on that finding, the trial court ruled that application of the Board's Policy to Lopez, who voluntarily registered for the Band for-credit classes and not the other elective for-credit music classes, would not constitute an unreasonable search.

The trial court found, based on the testimony of the football coach and the band director, that the level of drug use was

about the same among Band members, athletes, and participants in other extracurricular activities as in the student body as a whole. Lopez presented no evidence suggesting that drug use among band members differed from the rest of the student body. In light of the findings of the survey indicating that drug use was pervasive among students and the anecdotal accounts of the school district's witnesses, and in the absence of contrary evidence of any kind, the trial court was entitled to draw the entirely reasonable inference that band members are approximately as likely to use drugs as other students. See Associates of San Lazaro v. San Lazaro Park Properties, 864 P.2d 111, 115 (Colo.1993); People in Interest of M.S.H., 656 P.2d 1294, 1297 (Colo.1983); Dominion Ins. Co. Ltd. v. Hart, 178 Colo. 451, 454, 498 P.2d 1138, 1140 (1972).

*17 Likewise, the trial court's findings on the intrusiveness of the drug testing were supported by permissible inferences from the record, and the majority errs by drawing its own different set of inferences. Specifically, the majority recites the band director's testimony to the effect that one student was unable to produce a urine sample because "he was embarrassed to do so." Maj. op. at 12. The trial court, however, made no such finding.

The majority's assessment of the differences in the legitimate privacy expectations of athletes and band members is similarly grounded, at least in part, on factual inferences not drawn by the trial court and not compelled by the record. The majority states that students enrolled in mandatory physical education classes are not required to shower together, so the trial court's findings on this issue are clearly erroneous. See maj. op. at 22. While communal showers may not be formally required, the record supports the trial court's finding that, as a practical matter, students in physical education classes undress and shower together "on a daily basis." Moreover, the record does

not support the majority's assumption that students involved in extracurricular athletics are required to shower after finishing their activities any more than band members.

B.

The majority takes great care to attempt to limit its holding today "to the marching band." Maj. op. at 6. Nonetheless, the majority relies upon facts dependent upon the reach of the entire Policy with respect to athletes and students engaged in extracurricular activities.

For example, if the majority's "hold[ing], under the facts of this case" is that "the policy is unconstitutional with respect to the marching band," then it is unclear why the reach of the Policy as to "[a]ll students participating in the fall high school activities of volleyball, football, golf, [and] cheerleading," or the fact a total of "181 out of approximately 500 high school students were tested and 90 out of 333 junior high school students were tested," maj. op. at 10, is material to the majority's reasoning. Instead, it seems, a lower number--that is, 73--or the number involved in Band (or less than fifteen percent) is more relevant to the majority's analysis. Thus, the fact that "one in every three high school students" and "one in every four junior high school students was tested," maj. op. at 10, should be irrelevant here. Unlike the majority, I find support in the record for the trial court's findings.

In sum, I share the majority's understanding that our review of the trial court's factual determinations is limited to determining whether the findings are clearly erroneous. See maj. op. at 23; see also Podoll, 935 P.2d at 18. Based on my reading of the record, however, the majority fails to give sufficient deference to the trial court's findings of fact under this standard of review. Thus, facts not found by the trial court

are subtly used to alter the legal outcome of the admittedly close legal questions in this case.

II.

***18** The Fourth Amendment to the United States Constitution guarantees the right to be free from unreasonable searches conducted by the government. See Univ. of Colo. v. Derdeyn, 863 P.2d 929, 936 (Colo.1993). I agree with the majority's conclusion that the collection and testing of urine samples for the purpose of detecting illegal drugs is a search within the meaning of the Fourth Amendment. See maj. op. at 15; Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); People v. Williams, 192 Colo. 249, 257-59, 557 P.2d 399, 405-07 (1976). Accordingly, any school drug testing policy must pass muster under the Fourth Amendment, because students do not "shed their constitutional rights ... at the schoolhouse gate." Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The policy also must be consistent with the privacy guarantees by Art. II, § 7 of our state constitution. See Derdeyn, 863 P.2d at 946.

However, the constitutional rights of students in the public schools must be balanced against the unique demands of the educational environment. See New Jersey v. T.L.O., 469 U.S. 325, 346, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (upholding search despite absence of probable cause). Searches in the public schools, like other searches not solely intended to serve law enforcement purposes, are not necessarily unreasonable under the Fourth Amendment despite the absence of individualized suspicion. Therefore, in deciding whether the drug-testing Policy in this case violates the Fourth Amendment, we must conduct a "context-specific inquiry, examining closely the competing private and public interests

advanced by the parties." Chandler v. Miller, 520 U.S. 305, 311, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

In Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the United States Supreme Court conducted such an inquiry in the context of public school drug testing, upholding a random urinalysis requirement for students participating in extracurricular athletics. The drug testing program was adopted in response to increased drug use. Id. at 649- 51.

The Court in Vernonia used a three-part analysis to determine whether drug testing in a public school is permissible without individualized suspicion: (1) the legitimate privacy expectations of the students involved; (2) the extent of the need for drug testing; and (3) the nature and extent of the intrusion on the students' privacy interests in light of the drug testing procedures involved. See id. at 654-63.

***19** Our task is to apply the standards announced in Vernonia to the drug testing policy adopted by Trinidad School District R-1 and applied to Lopez as a member of the Trinidad High School Marching Band. In doing so, I believe we must compare the findings of the trial court, unless not supported by the record, to the evidence before the Vernonia court. The majority also notes that University of Colorado v. Derdeyn, 863 P.2d 929 (Colo.1993), where we struck down a program of random drug testing for college athletes, remains good law, and its facts illuminate the inquiry into the constitutionality of the program challenged here.

III.

A.

While "state-operated schools may not be enclaves of

totalitarianism," Tinker, 393 U.S. at 511, the expectation of privacy enjoyed by students in these schools is unquestionably lower than in the general population outside the public education system. Indeed, the public schools are entitled--and even expected--to exercise a degree of supervision and control over their students that would be constitutionally unacceptable if exerted over adults outside the schools. See T.L.O., 469 U.S. at 339-40. These limitations on the constitutional rights of public school students are permitted because a public school must have the power to impose swift and informal discipline consistent with its custodial duties and to carry out its educational mission. See id.

In Vernonia, the student athletes covered by the random drug testing program were found to enjoy an even lower expectation of privacy than other students. This diminished expectation of privacy was due to several factors: (1) students participating in athletics are often heavily regulated; (2) communal undress in locker rooms is a more-or-less inherent feature of participation in high school athletics; and (3) the use of illicit drugs increases the risk of injuries where physical performance is required. These same factors apply with equal force here: (1) members of the marching band are subject to Band rules and regulations; (2) band members engage in communal undress, albeit limited; and (3) playing and performing marching formations while engaged in band competitions gives rise to the risk of injuries where physical performance is required.

However, the Supreme Court's finding that athletes have a lower expectation of privacy was not based entirely, or even primarily, on factors unique to athletics. For example, the Vernonia Court noted that participation in high school sports is voluntary, so students were not required to expose themselves to the possibility of drug testing. Most important

of all, though, was the relationship of public schools to their students. The schools stand, if not "in loco parentis" with respect to minor students, then at least in a position that gives them a significant degree of responsibility for the welfare of the children entrusted to their care:

> ***20** The most significant element in this case is ... that the [p]olicy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.... [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Vernonia, 515 U.S. at 665.

Applying these same principles to students participants in marching band, I conclude that the degree of privacy enjoyed by members of a marching band at a public high school is significantly lower than that enjoyed by the general public. Moreover, the expectation of privacy is lower than for other students who do not voluntarily choose to participate. At the same time, and importantly here, the students who sign up for marching band know that they are subject to drug testing.

The majority notes that eligibility to participate in the Band is conditioned on enrollment in two band classes offered for credit, making the curricular and extracurricular components of the Band "inextricably linked." Maj. op. at 25. This fact does not, however, transform the marching band from a voluntary into a mandatory activity for purposes of the privacy interests at stake for students who choose to participate. Indeed, the majority cites no authority for the proposition that the privacy interests at stake in an elective activity turn on whether or not academic credit is offered for participation.

In fact, Trinidad High School offers several for-credit music classes. Thus, the two elective classes available only to those

participating in band were not the only elective music classes offered by the school. Therefore, any student, including Lopez, could decide not to be tested and still receive for-credit elective music classes taught by the same teacher. In my view, therefore, Band participation remained voluntary. [FN26]

For privacy purposes, I see no reason to distinguish between a voluntary extracurricular activity and an elective co-curricular activity. [FN27] In both situations, participation is optional, i.e., students are not required to play in the marching band in order to graduate any more than they are required to play on the football team. If the Trinidad schools gave physical education credit to members of the football team, the invasion of privacy resulting from mandatory drug testing would be no different, and the validity of the testing program as applied to athletes would not change. I simply cannot see any principled basis for drawing the line between co-curricular activities on one hand and entirely extracurricular activities on the other. [FN28]

The reasoning in Derdeyn is fully consistent with the foregoing analysis of the privacy interests of high school students involved in extracurricular activities. Almost all college students, unlike most high school students, are adults. As such, college students are not subject to intrusions on their privacy simply by virtue of their status as students. See Derdeyn, 863 P.2d at 938. In addition, post-secondary schools serve an almost exclusively educational--as opposed to custodial--function, and they educate students who are presumed to have reached the necessary degree of intellectual and emotional maturity to make decisions without the protections and disciplinary powers appropriate in the in loco parentis relationship found in our public secondary schools.

*21 Unlike the evidence presented in Vernonia, the record in

this case does not show that athletes or other students participating in extracurricular activities are or were the "ringleaders" of a drug-using clique in the public schools. However, the admitted evidence of a "serious, growing, and immediate drug problem," was more than sufficient for the trial court, not to mention the Board, to conclude that the drug problem in the Trinidad schools was quite serious, both in absolute terms and by comparison to other schools around the country. [FN29]

B.

As we explained in Derdeyn, the interest served by suspicionless drug testing need not be "compelling" in the sense in which that term is used in some other types of constitutional cases in order to survive scrutiny under the state or federal constitutions. See Derdeyn, 863 P.2d at 944. Instead, the relevant inquiry is the strength of the interests served compared with "other types of commonly asserted interests that have been held sufficient or insufficient to justify similar intrusions." Id. The extent of the intrusion into the privacy of the school children tested under Policy 5541.1 seems commensurate with the gravity of the health problem associated with illicit drug use by minors which was facing Trinidad's school officials.

As the trial court observed, participants in the marching band were selected for testing because they are role models for other students, especially younger students. They represent their school in public performances and competitions, and they wear school uniforms with their school's name at these public events.

Based on the testimony presented at trial, the trial court found that the Board's selection of these students for testing was

reasonable in light of their influence on other students. By showing that role models were drug-free, the Board reasonably concluded, the Policy would set a positive example for all students.

C.

As noted previously, the nexus between the group tested and the group thought to be encouraging the use of drugs is not as tight in this case as in Vernonia, where the record showed that the drug problem was particularly acute among athletes and that athletes were at the center of a rebellion against the school's anti-drug efforts. I do not read Vernonia, however, as requiring evidence that the group tested is precisely the same as the group in which drug use is heaviest or that the students tested are the leaders of a concerted effort to undermine anti-drug policies.

Instead, Vernonia recognizes that when confronted with a serious drug problem in the school system, educational officials may take reasonable steps to detect and deter drug use among the students entrusted to their care. The match between the problem identified and the students subjected to drug testing need not be perfect, because the school system is not equipped and should not be expected to meet the exacting standards applicable when a search is conducted for purposes of law enforcement rather than to meet the "special needs" of the educational environment. See Vernonia, 515 U.S. at 653; Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).

***22** The way the Policy is carried out and its rehabilitative and nonpunitive or non-law enforcement purposes reinforce my view that the intrusion into the privacy rights of the affected students is not unreasonable in relation to the

interests served by the Policy.

Under Policy 5541.1, the results of any positive test are to be kept confidential, and the Policy specifically provides that the results are not to be used for law enforcement purposes or as the basis for punitive measures by school administrators. In Derdeyn, by contrast, university administrators declined to provide any meaningful assurance that the results of drug tests would be kept confidential. See Derdeyn, 863 P.2d at 942.

In addition, the University of Colorado declined to agree that it would not subject athletes to visual monitoring while they were engaged in the process of providing urine samples. See id. at 939. Visual monitoring was incorporated into an earlier version of the testing program, and the record included testimony from students who found this aspect of the testing offensive. See id. at 940 n. 22. By contrast, the students tested in this case were asked to enter a restroom and produce a urine sample while a member of the testing company staff stood nearby but did not visually observe the production of the sample.

In view of the evidence before the Board and the trial court that tended to establish the existence of a serious drug problem in the Trinidad school system, and in light of the circumstances surrounding the administration of the Policy, I would hold that the Board's Policy at issue in this case was reasonable under Vernonia and Derdeyn, even though it was applied to all members of the Band, rather than only to those students participating in sports. See generally Todd v. Rush County Schs., 133 F.3d 984 (7th Cir.1998) (upholding random drug tests of students in extracurricular activities). [FN30]

IV.

In some respects, this is a difficult case. Regardless of how one resolves this dispute, our sensibilities are subjected to the tension between the Board's Policy intended to protect our children and the recognition of the privacy interest students have in being free from unreasonable searches, even while attending public school. Resolution of this conflict, for each of us, is not an easy task. Nonetheless, while I appreciate the majority's deference to a student's right to be free from the search associated with the Policy, I believe the privacy right announced in the majority opinion must yield to the "special needs" that "exist in the public school context," as acknowledged by the United States Supreme Court in Vernonia. See Vernonia, 515 U.S. at 653. However, while we must "consider[ ] ... the nature of the privacy interest upon which the search here at issue intrudes," id. at 654, I believe that two other factors control: (A) The Fourth Amendment "does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate,' " or as reasonable expectations of privacy; and (B) that "[c]entral ... to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." Id. (emphasis added).

***23** While the majority agrees that "the nature of the Board's ... concern 'is important--indeed perhaps compelling,' " maj. op. at 35 (quoting Vernonia, 515 U.S. at 661), thereafter we part ways. The majority's concern that the testing reaches those "who are enrolled in for-credit, instrument music classes" and that "there was no demonstrated risk of immediate physical harm," maj. op. at 36, in my view, should give way to the emergency circumstances confronting the Board: (1) the harm that 63% of eleventh graders and 44% of all students encounter daily by engaging in illicit drug use; and

(2) the majority's own recognition that the Policy reached only those students engaged in "extracurricular activities ... on a ... volunteer basis." Maj. op. at 38.

What we do today is to bar the Board's studied and considered response to an admitted "serious, growing, and immediate" emergency that jeopardized the safety of most eleventh graders and almost half of all the students attending sixth through twelfth grade. In my view, that is not a result required by our constitution and the public policy response of the Board does not violate the reasonable expectations of privacy of the school children under its care and tutelage.

V.

In sum, I would hold that the program of suspicionless pre-participation drug testing of students voluntarily involved in marching band embodied in Policy 5541.1 does not offend our state or federal constitutions. Where a school district is faced with evidence of a serious drug problem among its students, the officials charged with authority over its schools and the responsibility for the safety of its students are entitled to conduct such searches in the form of drug tests as may be reasonable. In light of the severity of the acknowledged illicit drug usage and scope of the intrusion that is clearly limited to voluntary activities, I do not see an unreasonable invasion of the privacy interests of the children under the Board's "responsibilities ... as guardian and tutor of children entrusted to its care." Therefore, I respectfully dissent from the majority opinion and its judgment.

I am authorized to say that VOLLACK, C.J., joins in this dissent.

FN1. We granted certiorari on the following issues:

1. Whether the district court abused its discretion in its Findings of Fact and specifically, in finding that Trinidad School District No. 1 had a serious drug problem.
2. Whether the district court erred in holding that the School District's drug testing policy was not unconstitutionally vague and overly broad.
3. Whether the district court erred in holding that the School District's policy of pre-participation drug testing for students enrolled in extracurricular activities and specifically the Marching Band did not violate the students' rights under the Fourth Amendment to the United States Constitution.
4. Whether the district court erred in holding that the School District's policy of pre-participation drug testing for students enrolled in extracurricular activities and specifically the Marching Band did not violate the students' rights under Article II, Section 7, of the Colorado Constitution.
5. Whether the district court erred in ruling that the School District's policy was lawful as applied to Respondent/Cross-Petitioner Carlos R. Lopez.

FN2. It is not clear from the complaint whether Lopez was formally suspended from both the marching band and the two band classes in which he was enrolled, or simply suspended from the marching band. The complaint merely refers to Lopez's suspension from "the Band." However, the band director testified that he understood that a student who refused to consent to drug testing would be suspended from both the marching band and the for- credit band classes. Lopez testified to the same effect. Even if the superintendent suspended Lopez from the marching band only, that suspension would have effectively prevented Lopez

from continuing his enrollment in the for-credit classes because, as we explain in part VI-A of this opinion, a student cannot pass the for-credit classes without participating in the marching band. Of course, Lopez was not suspended from the band classes or marching band because the trial court entered a temporary restraining order prohibiting his suspension. See infra note 11.

FN3. The Fourth Amendment to the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FN4. Article II, section 7, of the Colorado Constitution provides: The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

FN5. Because we hold that the Policy violated the United States Constitution, we need not address Lopez's arguments that even if the Policy did not violate the United States Constitution, the Policy nevertheless violated the Colorado Constitution.

FN6. As originally drafted, the Policy was limited to student athletes, which by definition includes any student in grades six through twelve who participates in athletic practices, cheerleading, and/or athletic contests. However, when the Board subsequently adopted the final version of the Policy on July 23, 1996, the Board expanded it to include students participating in extracurricular activities. We address the validity of the Policy only as applied to the marching band. We express no opinion on the application of the Policy to other student activities.

FN7. The Institute's survey asked students a wide variety of questions, including questions concerning family characteristics (e.g., whether the student's parents are divorced, parents' educational status, the number of the hours the parents work), attitudes toward school, involvement in activities, peer influence, values, self-esteem, alcohol use, tobacco use, sexuality, physical and sexual abuse, and drug use.

FN8. The portion of the Institute's study concerning drug use was based on the student population in general. As explained in part IV of this opinion, the study did not quantify the level of drug use among participants in the various extracurricular activities.

FN9. Apparently, the intent was to monitor the students' urination by sound. However, in his answer brief, Lopez points out that the New Choices monitor could observe male students in the stall. The record supports this assertion. The high school's football coach testified conclusively that the stalls did not have doors. Thus, it appears that the New Choices monitor in the men's rest room could listen to a male student

urinating and was not prevented from watching the student from behind.

FN10. The consent form, which the Policy references, provides that students will be tested for any substance considered illegal or controlled by the Food and Drug Administration.

FN11. In its order, the trial court does not mention or discuss other music classes that were offered to Trinidad High School students. The only evidence in the record about other music classes at the high school came from the band director, who testified in response to a general question about his duties that he taught other classes in addition to the marching band classes: concert band, jazz band, honor bands, solo ensembles, and modern ensembles. There is no evidence in the record to reflect whether Lopez was interested in taking these other courses in lieu of the two band courses in which he enrolled, nor is there any evidence in the record which allows for a comparison of the content of these courses.

FN12. The District points out in its answer/reply brief filed with this court that Lopez completed his participation in the marching band by the time of the trial, which according to the District meant that "barring some unforeseen circumstance that would prevent his graduation, Mr. Lopez almost certainly would not be exposed to drug testing again." As noted, the trial court originally entered a temporary restraining order requiring the District to reinstate Lopez to the band classes and marching band. The temporary restraining order, which was dated September 6, 1996, also prevented the District from

suspending Lopez from band for refusing to consent to drug testing. On September 13, 1996, the trial court entered an order extending the temporary restraining order until further order of the court. The two day trial occurred on October 31, 1996 and November 1, 1996. On December 19, 1996, the trial court entered its findings of fact, conclusions of law, and judgment, which dismissed Lopez's complaint. Because marching band had concluded by the time the trial occurred, it appears that Lopez was able to complete marching band without having to submit to drug testing. It is not clear, however, whether the issue of drug testing became moot for Lopez after marching band ended. At trial, Lopez testified that he planned to try out for baseball later that school year. Given the dates of the trial and the trial court's order, the record does not indicate whether Lopez subsequently tried out for baseball or any other extracurricular activities or whether he decided not to pursue any of these activities because of his decision not to consent to drug testing.

FN13. The section of the Policy allowing for suspicion-based testing provides:
Random Testing--any student athlete [or any student participating in an extracurricular activity] is subject to random drug-testing throughout the school year, provided the Superintendent of Schools, School Principal, and Athletic Director agree and have reasonable suspicion to believe that a student athlete [or any student participating in an extracurricular activity] is under the influence of illicit drugs and/or alcohol.

FN14. A review of the record indicates that there were

only four questions with the following responses inquiring about drug abuse among students participating in athletics and/or extracurricular activities as compared to the general population: (1) the high school football coach testified that "[f]ootball, as far as percentage, I would say probably close to the same as the student body;" (2) the band director testified that as for marching band members, that he "did not have any clear-cut facts at my disposal that indicates any usage, to me," but that he "would speculate it to be the same as [the] general population" (emphasis added); (3) the junior high school principal testified that he "couldn't answer" the question whether the percentage of students in the general population using drugs was the same as students in the athletic program; and (4) the Board President testified that she "can't make that analysis" when asked to compare drug use among student athletes or students participating in extracurricular activities to students in the general population.

FN15. Whether or not the Policy is unconstitutionally vague is a separate inquiry from our discussion in part VI of this opinion where we consider the Policy's actual scope, which reached students enrolled in the District's regular curriculum.

FN16. At its July 23, 1996 meeting, the Board expanded the Policy to include all students in extracurricular activities. See supra note 6. Apparently, while the Policy heading was amended to include "extra curricular," the text of the Policy remained unchanged. Thus, the text of the Policy only refers to student athletes, which by definition includes cheerleaders.

FN17. The trial court order states, "Trinidad High School offers its students two elective band classes for credit, a brass/percussion class and a woodwinds class. A student may not enroll in the marching band class unless they are enrolled in both of the band classes." While Lopez was enrolled in both classes, the record reflects that not all band class students take both classes. Specifically, the marching band director testified that there are some students who take the brass/percussion class but not the woodwinds class and vice-versa. Nevertheless, any student enrolled in the brass/percussion class and/or the woodwinds class must participate in the extracurricular activity of the marching band. Consequently, whether the student is enrolled in only one or both of the for-credit classes does not affect our analysis.

FN18. Our research indicates that since Vernonia, approximately 100 opinions have cited the case. Of those opinions, only one case considered the constitutionality of a public school system's suspicionless drug testing program. In Todd v. Rush County Schools, 133 F.3d 984, 984-87 (7th Cir.1998), reh'g en banc denied, No. 97-2548, 1998 WL 122190, at * 1 (7th Cir. Mar.19, 1998), the Seventh Circuit upheld an Indiana school district's random, suspicionless drug testing policy for students seeking to participate in any extracurricular activity. Although the post- Vernonia case law is scant, commentators' views about Vernonia have filled the law reviews. Compare Irene Merker Rosenberg, Public School Drug Testing: The Impact of Acton, 33 Am.Crim. L.Rev. 349 (1996) (criticizing Vernonia for minimizing the plaintiff's interests and deeming the plaintiff's parents' interests as nonexistent and arguing

for considerations of the impact on students' autonomy, sense of bodily integrity, sense of fairness, and the limits of governmental power), Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 Harv. C.R.- C.L. L.Rev. 529, 551-556 (1997) (criticizing Vernonia's balancing test for inadequately protecting the rights guaranteed by the Fourth Amendment), and Drug Testing--Student Athletes, 109 Harv. L.Rev. 220 (1995) (criticizing the opinion for a lack of doctrinal coherence and government responsibility), with Roscoe C. Howard, Jr., Vernonia School District 47J v. Acton: The Right Response for Drug Testing of Student Athletes, 6 Kan. J.L. & Pub. Pol'y 17 (1997) (arguing Vernonia reached the proper result under the Fourth Amendment).

FN19. The Supreme Court has applied a "special needs" analysis in several prior cases. See, e.g., T.L.O., 469 U.S. at 351 (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."); Griffin v. Wisconsin, 483 U.S. 868, 873-74, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (explaining the Fourth Amendment analysis in special needs cases); Skinner, 489 U.S. at 619-20 (same); Von Raab, 489 U.S. at 665-66 (same).

FN20. The band director testified that members of the marching band "are instructed to wear either shorts or cut-offs and a T-shirt so the band uniform can simply

slip on and off quickly and easily." The band director also testified that marching band members do not shower together after a performance.

FN21. We emphasize that we do not hold that the students affected by the Policy had higher expectations of privacy than the students in Vernonia based solely on the fact that the Policy required students receiving academic credit to be tested. As we have explained, the students affected here also were not subject to the type of communal undressing that the Vernonia Court explained occurred in that case, a distinction which we view as highly relevant and important.

FN22. In Vernonia, the Court also discussed the intrusion of students' privacy as it related to the information that the drug test disclosed and concluded that this intrusion was not significant. See Vernonia, 515 U.S. at 658-60. The Court explained that the test only looked for drugs, that the drugs for which the test screened were standard drugs, and that only a limited class of school personnel received the test results. See id. at 658. These considerations are identical in this case under the Policy and we therefore arrive at the same conclusion.

We also note that under the Policy a student must disclose any prescription medicines the student is taking before the District tests the student. If the student decides not to disclose such information and the mandated drug test reveals use of prescription drugs, the student is sanctioned just as if he or she tested positive for illicit drugs. While the Vernonia policy contained a similar requirement, the Vernonia Court did not consider the required disclosure to alter its conclusion regarding the invasion of the privacy

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In The

Supreme Court of the United States

October Term, 1997

WILLIAM P. TODD and DIANA J. TODD, on their own behalf and as next friends for their son, WILLIAM MATTHEW TODD, *et al.*,

Petitioners,

v.

RUSH COUNTY SCHOOLS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED FOR REVIEW

Does the Rush County Schools Extracurricular Activities Drug Testing Program, which authorizes random urinalysis drug testing of all students who participate in extracurricular activities, violate the Fourth and Fourteenth Amendments to the United States Constitution?

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STATEMENT OF THE CASE

The respondents respectfully refer the Court to the opinions of the Court of Appeals and the District Court below for a concise statement of the facts material to the consideration of the question presented in this petition. Appendix to Petition for Writ of Certiorari at pp. A-1 through A-3 and A-15 through A-21.

ARGUMENT

Reason For Denying The Writ

Plenary review in this case is inappropriate because the Court of Appeals correctly affirmed the District Court's decision in this case consistent with the rationale of *Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995), this Court's only controlling precedent.

A. Introduction

In *Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995), this Court held that a public school district policy authorizing random urinalysis drug testing of students participating in student athletics did not violate the Fourth and Fourteenth Amendments to the United States Constitution:

> The most significant element in this case is the first we discussed: that the [drug testing policy] was undertaken in furtherance of the government's responsibilities under a public school system, as guardian and tutor of children entrusted to its care. . . . [W]hen the government acts as guardian and tutor, the relevant question

> is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 665 (footnote omitted). At issue in this case is a public school drug testing policy which is essentially identical to the one at issue in *Vernonia* with one difference: the drug testing policy at issue in this case applies to all extracurricular activities, including student athletics.

In ruling that the Rush County Schools Extracurricular Activities Drug Testing Program did not violate the Fourth Amendment, the Court of Appeals and the District Court below addressed two issues: (1) whether the program was reasonable under the special needs exception to the Fourth Amendment; and (2) whether this Court's ruling in *Vernonia* may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities. These two issues are analyzed below.

B. Employing The Context-Specific Inquiry Mandated By This Court In *Vernonia* And *Chandler*, Both The Court Of Appeals And The District Court Correctly Found That The Rush County Schools Extracurricular Activities Drug Testing Program Was Reasonable Under The Special Needs Exception To The Fourth Amendment.

In *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997), this Court held:

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on "special needs,

> beyond the normal need for law enforcement." . . . When such "special needs" – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a *context-specific inquiry*, examining closely the competing private and public interests advanced by the parties.

Id. at 1301 (emphasis added), *citing Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). *Vernonia* is this Court's only controlling precedent in which the "special needs" exception to the Fourth Amendment was applied in the "public school" context.

In *Vernonia*, this Court held that a school district policy authorizing random urinalysis drug testing of students participating in student athletics did not violate the Fourth and Fourteenth Amendments to the United States Constitution. *Vernonia*, 515 U.S. at 665. Specifically, *Vernonia* stands for the proposition that the random urinalysis drug testing program at issue did not violate the students' rights under the Fourth Amendment to be free from unreasonable searches because the policy was reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students in general (and student athletes in particular); (2) the relative unobtrusiveness of the search; and (3) the severity of the need met by the search. *Vernonia*, 515 U.S. at 648-666. *See also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (random drug testing of employees engaged in safety-sensitive occupations such as operation of train held constitutional under Fourth

Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of employees with access to classified or sensitive information held constitutional under Fourth Amendment).

In finding the special needs exception to the Fourth Amendment met in *Vernonia*, this Court employed a context-specific inquiry:

> Central in our view to the present case is the fact that the subjects of [this drug testing program] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.
>
> . . . .
>
> Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude [the drug testing program] is reasonable and hence constitutional.
>
> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts [*i.e.*, contexts other than the public school system].

Vernonia, 515 U.S. at 654, 664-65. The question presented in this case is whether a random drug testing program applicable to all extracurricular activities, including student athletics, "passes constitutional muster."

The first issue addressed by the Court of Appeals and District Court below was whether the Rush County Schools Extracurricular Activities Drug Testing Program was reasonable under the special needs exception to the Fourth Amendment. The petitioners argue that there is no

evidence of a drug crisis in this case similar to the one in *Vernonia*, A-25, and that the special needs exception to the Fourth Amendment is therefore not satisfied. *Id.* In finding that the program was reasonable under the special needs exception to the Fourth Amendment, the District Court below analyzed this issue as follows:

> If this were a case like *Chandler* where the State of Georgia was attempting to create out of whole cloth a "special need" for the testing of adult political candidates, [the empirical evidence of drug use by the students in this case] may not be sufficient to show that need. . . . However, the controlling precedent is *Vernonia*, and that case indicates that the evidentiary hurdle for a public school is lower than in other contexts. The [*Vernonia*] Court states generally that, "We have found such 'special needs' to exist in the public-school context." . . . [T]he evidence presented, while perhaps not rising to raging epidemic levels, can support a finding that there was a "special need" for the Program in Rush County. There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the "important enough" interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youths may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

A-26 through A-27. The Court of Appeals concurred. A-3 through A-6.

The petitioners in this case argue, in effect, that the special needs exception to the Fourth Amendment cannot

be met unless the record supports a finding of a drug crisis of "raging epidemic levels." However, this Court's precedents do not support this argument. Proof that a drug problem exists among the individuals or groups tested is not even a constitutional prerequisite under this Court's precedents. *See, e.g., Skinner*, 489 U.S. at 601 (random drug testing program found constitutional based on findings of drug use by railroad employees nationwide without proof that a problem existed on the particular railroads whose employees were subject to the test); *Von Raab*, 489 U.S. at 656 (random drug testing program found constitutional where there was no documented history of drug use by any custom officials). *See also Chandler*, 117 S. Ct. at 1303.

Although proof that a drug problem exists among the individuals or groups tested is not a constitutional prerequisite, the record in this case *does* support a finding of "a demonstrated problem of drug abuse" among the students attending Rush County Schools. *Chandler*, 117 S. Ct. at 1303; A-15 through A-21.[1] Unlike *Chandler*, the record in this case *does* reveal evidence of drug use, and unlike *Chandler*, the need revealed is "special" not "symbolic." *Chandler*, 117 S. Ct. at 1305 ("[t]he need revealed, in short, is symbolic not 'special,' as that term draws meaning from our case law").

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[1] The empirical evidence of Rush County Schools' effort to curb the drug use by its students is collected and separately bound as Exhibits 2 and 3 to the deposition of Assistant Superintendent Bet. J. Kotowski. Deposition of Bet. J. Kotowski, November 20, 1996, R. Doc. 29, Exhibit 2, Vol. I, Part 1; R. Doc. 30, Exhibit 2, Vol. I, Part 2; R. Doc. 31, Exhibit 3, Vol. II, Part 1; R. Doc. 32, Exhibit 3, Vol. II, Part 2.

In short, the record in this case demonstrates that Rush County Schools had a "legitimate concern" about drug use among its student body. A-27. In an effort to curb drug use by students and acting as "a reasonable guardian and tutor" would act under similar circumstances, *Vernonia*, 515 U.S. at 665, Rush County Schools implemented a drug testing policy consistent with the reasoning of this Court in *Vernonia*. *Vernonia* does not require a public school district to wait until there is a drug problem of "raging epidemic proportions" before acting. *Id.*

C. Both The Court Of Appeals And The District Court Correctly Found *Vernonia's* Reasoning May Be Constitutionally Extended To Cover A Drug Testing Program Which Applies To All Students Participating In Extracurricular Activities Such As The Rush County Schools Extracurricular Activities Drug Testing Program.

The second issue addressed by the Court of Appeals and the District Court below was whether *Vernonia's* reasoning may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities. The petitioners in this case "argue that the difference in the [drug testing programs in *Vernonia* and in this case] – student athletes versus all extracurricular participants – renders the Rush County Schools Extracurricular Activities Drug Testing Program] unconstitutional, at least as it applies to the non-athlete extracurricular participants." A-25.

In finding that *Vernonia's* reasoning may be constitutionally extended to cover a drug testing program which

applies to all students participating in extracurricular activities, the District Court analyzed this issue as follows:

> In the end, however, any perceived differences between the student athletes in *Vernonia* and the non-athlete extracurricular participants in this case turn out to be more ethereal than real. As the Court in *Vernonia* stated, *all* public school students have a diminished expectation of privacy; the Court simply pointed out that athletes had even lower expectations. Furthermore, the possibility of injuries is not simply isolated to athletic activity. While the possibility of injury is exacerbated in athletic activities, it is not isolated only to those situations; . . . [W]hile perhaps not rising to the level of being regulated by the Indiana High School Athletic Association, extracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations. Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant. Also, much like athletes, students in other extracurricular activities can take leadership roles in the school community and can serve as an example to others. Being elected class president may put a student in a venerated position, much like that of a star athlete. In fact, the same could be said of any student who participates and excels in any extracurricular activities. Thus, the school has an interest in the conduct of those who may serve as an example to others. In the final analysis, the reasoning of *Vernonia* seems to hold true for any student who is a member of an extracurricular activity. The

> [*Vernonia*] Court simply pointed out these reasons were especially applicable to student athletes.

A-27 through A-28.[2] The Court of Appeals concurred. A-3 through A-6.

In short, a close reading of *Vernonia* reveals that its reasoning may be constitutionally extended to cover a drug testing program which applies to all students participating in extracurricular activities such as the program at issue here.

D. The *Trinidad* Case Discussed In Petitioners' Supplemental Brief Is Inapposite To This Case Because Its Holding Is Limited To Students Participating In Marching Band And Its Rationale Is Tailored To Its Unique Facts.

Although the lower court in *Trinidad School District No. 1 v. Lopez*, 1998 WL 373305 (Colo. June 29, 1998), held that random urinalysis drug testing of students who participated in any extracurricular activities was not violative of the Fourth Amendment, Defendants' Brief in Support of Motion of Summary Judgment, Rec. Doc. 23, Exhibit C, the majority opinion of the Supreme Court of

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[2] Indeed, some legal commentators have argued that the rationale of *Vernonia* can be logically extended to apply to a school drug testing program which covers *all* public school students. *See, e.g.*, Note, *Who Will Speak for the Teachers? Precedent Prevails in Vernonia School District 47J v. Acton*, 33 Houston L. Rev. 1229 (1996); Note, *The 4Rs of Drug Testing in Public School: Random Is Reasonable and Rights Are Reduced*, 80 Minn. L. Rev. 1222 (1996). Defendants' Brief in Support of Motion for Summary Judgment, R. Doc. 23, Exhibits A and B.

Colorado in *Trinidad*, in reversing the lower court, took "great care to attempt to limit its holding . . . 'to the marching band.' " Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, Supp. App. at p. 32. In addition, the rationale of the majority opinion in *Trinidad* was uniquely tailored to the facts of that case. *Id. passim*. Accordingly, respondents respectfully submit that *Trinidad* is inapposite to this case.

Justice Scott's dissent in *Trinidad*, joined in by Chief Justice Vollack, cogently refutes not only the majority opinion's erroneous reasoning but also demonstrates why *Trinidad* is inapposite to this case:

> Based upon the record in this case, then, I would hold that the Policy adopted by the Trinidad School District is consistent with our state and federal constitutions. I am not persuaded by the majority that a constitutionally significant distinction exists between voluntary participation in an activity that is not required, here marching band, but includes attending an elective for-credit music class so as to result in an "absence of voluntariness." . . . Nor do I believe that the "qualitatively different type of [communal] undress" combined with the Band rules and regulations is constitutionally "significant,". . . . at least not to cause a result contrary to *Vernonia*.
>
> . . . .
>
> Finally, while I concede that the questions before us are not easy to resolve, I can see no distinction of legal significance to be drawn because a student engaged in Band as a extracurricular or co-curricular activity also is awarded academic credit for their participation.

> The portion of the policy under review impacts 73 students, or less than 15% of the student body, who voluntarily participate; it does not impose routine drug testing on all students required to attend school.

Supp. App. at pp. 28-29.

Given the limited holding of the majority in *Trinidad* and *Trinidad's* uniquely tailored rationale, respondents respectfully submit that the *Trinidad* case does not "directly conflict with the decision of the Seventh Circuit Court of Appeals in this case." Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari at p. 4. Therefore, the *Trinidad* case does not provide this Court with a "compelling reason" for granting petitioners' writ of certiorari in this case. *See* Supreme Court Rule 10.

CONCLUSION

Rush County Schools has a drug problem among its students. Is the drug problem "severe"? As far as Rush County is concerned, the answer to that question is an unequivocal yes. Rush County Schools acted as a "reasonable guardian and tutor" would act under similar circumstances. The drug testing program implemented by Rush County only applies to students who voluntarily participate in extracurricular activities, including student athletics. Therefore, respondents respectfully submit that the rationale of *Vernonia* may be constitutionally extended to cover the Rush County Schools Extracurricular Activities Drug Testing Program.

The petition for writ of certiorari should be denied.

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